82-1787
No. 82-____

Office-Supreme Court, U.S.
FILED
1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE BUCKINGHAM CORPORATION,

Petitioner,

—v.—

THE ODOM CORPORATION,
d/b/a ARIZONA DISTRIBUTING COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

This is a dealer termination case which is in some important respects similar to *Monsanto Company* v. *Spray-Rite Service Corporation*, No. 82-914 (*cert. granted* Feb. 28, 1983), now pending before this Court. Like *Monsanto*, it presents the narrow question:

> 1. Can a *per se* unlawful vertical price-fixing conspiracy be inferred from evidence that a supplier, concerned about resale prices, received complaints from one wholesaler about the pricing activities of another wholesaler and subsequently terminated the latter wholesaler?

In addition, however, this case poses the broader and more typical question that the courts and attorneys counseling their clients on termination matters must answer:

> 2. Can such a conspiracy be inferred from the routine communications that invariably follow price complaints?

More fundamentally, this case asks the Court to consider:

> 3. Can a *per se* price fixing conspiracy be inferred from such communications and termination in the face of undisputed evidence that the termination would significantly promote interbrand competition?
>
> 4. In view of the undisputed evidence that the conduct here promoted competition, is it accurate to assume that vertical restrictions related to price are invariably anticompetitive and, hence, to condemn all such restrictions as unlawful *per se*?*

Finally, we ask the Court to consider:

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* Although not expressly posed as an issue by the petitioner in *Monsanto*, the Department of Justice has asked the Court to consider this question in its Brief for the United States as Amicus Curiae on Petition for Writ of Certiorari, filed Jan. 3, 1983, at 15-18, *Monsanto Co.* v. *Spray-Rite Service Corp.*, No. 82-914 (U.S.).

5. In view of the similarities of this case and *Monsanto* and the more typical and fundamental questions raised here, would the Court have a better opportunity to resolve important questions concerning the application of the antitrust laws to vertical relationships if certiorari were granted in this case and the two cases set down for argument in tandem?

LIST OF PARTIES IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals for the Ninth Circuit are those listed in the caption of this Petition and Mazel Corporation and Copper State Distributors, Inc. The Buckingham Corporation is a subsidiary of Beatrice Foods Co.*

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* A list of The Buckingham Corporation's affiliates is annexed hereto as Appendix A.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, The Buckingham Corporation ("Buckingham"), asks that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit, entered in this case on February 25, 1983.

Opinions Below

The memorandum opinion of the Court of Appeals, not officially reported, is annexed hereto as Appendix B. The Court of Appeals' decision was unofficially reported at 44 Antitrust & Trade Reg. Rep. (BNA) 707 (March 31, 1983). The portions of the transcript of proceedings containing the oral opinion of the United States District Court for the District of Arizona (Hardy, J.) are annexed hereto as Appendix C. The judgment of the District Court is annexed hereto as Appendix D.

Jurisdiction

The judgment of the Court of Appeals was entered on February 25, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the District Court was based on 15 U.S.C. §§ 15 and 26, 28 U.S.C. §§ 1331, 2201 and 2202, and the doctrine of pendent jurisdiction, *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966).

Statute Involved

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Statement of the Case

The Parties

Buckingham is the United States importer of several brands of wines and spirits, the most important of which is Cutty Sark Scotch Whisky. For many years prior to August 1981, Buckingham distributed its products in Arizona through two wholesalers, Arizona Distributing Company ("ADC") and Copper State Distributors, Inc. ("Copper State").

At the time of trial, ADC was a division of the Odom Corporation, which distributed or brokered alcoholic beverages in four states and abroad. In Arizona it sold more than a thousand brands for more than a hundred suppliers, and grossed approximately $45 million annually. In sales, it was the largest liquor wholesaler in the state.

Copper State was a much smaller wholesaler with a much smaller line of products.

The Products

Arizona distributors sell more than 95 brands of scotch, four of which, including Cutty Sark, are known as premium scotches. Each of the other premium scotches is distributed by an exclusive wholesaler. ADC's president, Jack Braddock, testified at trial that more than 99% of all wines and liquors sold in Arizona were distributed through an exclusive wholesaler.

At one time, Cutty Sark was the leading scotch in the country, but over the years its sales and image declined. During the summer of 1980, its decline was so serious that Buckingham brought in new management to try to rejuvenate the brand.

Buckingham's Choice of Copper State as its Exclusive Distributor

Buckingham's practice of selling its products through two wholesalers put Buckingham at a disadvantage in the highly competitive Arizona market where virtually all wines and liquors were sold through exclusive wholesalers. ADC's president, Braddock, acknowledged this fact in a letter to Buckingham in March 1980:

> "I have always felt that the dual items suffer from a lack of salesmen's interest. There are only a handful of dual items in this market and the salesman always has an exclusive item to push in place of any brand which also may be handled by a competitor. * * * I am also sure that Cutty Sark sales could be increased by 10 to 15%, if we were the exclusive distributor. * * * . . . [O]ur state is not a healthy environment for dual merchandise. . . ."[1]

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1 The full text of Braddock's letter is annexed to this Petition as Appendix E.

Buckingham's new management, in its attempt to revive the floundering Cutty Sark line, began to evaluate and compare the two wholesalers in January 1981 in order to select one as exclusive distributor. In the competitive Arizona market, in which each wholesaler handles many brands, Buckingham naturally wanted a wholesaler who was willing to promote Buckingham's brands heavily and to whom these brands would be important. In the parlance of the industry, Buckingham's management was looking for "commitment" to Buckingham's products.

Several factors led to the conclusion that ADC lacked commitment to Buckingham's brands and that Copper State was more willing to promote them.

First, Copper State won a contest to become Buckingham's exclusive wine distributor in Arizona. It won because it sold far more wine than ADC during the 3-month contest period.

Second, Copper State's comparative sales performance figures were consistently higher than ADC's, apart from a brief and temporary leap in ADC's sales caused by an unprecedented 10-day discount in April 1981. Usually Copper State's prices were lower than ADC's.

Third, Buckingham learned that ADC's president had testified in December 1980 in another action that he considered Cutty Sark an unprofitable but "necessary evil" that he would get rid of when he could obtain another prestige scotch to replace it.

Finally, Copper State's chief executive, Bernard Gellerman, had persistently displayed his commitment to promoting the Buckingham brands.

On August 6, 1981, Buckingham made the only choice it could to improve its competitive position in the Arizona market—it terminated ADC.

Proceedings Below

The District Court

ADC claimed in the District Court that its termination was the result of a conspiracy between Buckingham and Copper State to fix prices. Its claim was based entirely upon a handful of innocuous communications during the 10 days in April 1981 when ADC's unprecedented discount occurred. At the most, there was a complaint by Gellerman and a few communications between Buckingham and the two distributors in an effort to resolve the confusion caused by the unprecedented price cut.

There was no evidence that Buckingham in any way suggested the actual price charged by ADC or Copper State for Buckingham's brands.[2] There was no evidence that Gellerman and Buckingham ever discussed future prices or that Buckingham made any requests concerning prices. Nor was anything said in meetings between Braddock and Buckingham personnel from which a threat of termination could be implied.

ADC also relied on a memorandum written on April 29, 1981, by Ken Ahlburg, Buckingham's Western Division Manager, to Buckingham's Senior Vice President of Sales outlining his reasons for recommending Copper State as exclusive distributor.[3] While the memorandum discusses the April discount—among other factors unrelated to pricing—nothing in it suggests coercion or a pricing agreement.

At the close of ADC's case, the District Court, concluding that "there is no evidence to show that these parties acted in concert . . .," directed a verdict dismissing ADC's price fixing claims. The court perceptively observed that if this type of evidence could support an antitrust violation, Buckingham

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2 The net wholesale price is the price listed by the wholesaler, minus a discount dependent upon the number of cases purchased. Buckingham suggested list prices for its products, but it *never* suggested discounts for Cutty Sark or its wines sold in Arizona.

3 The full text of the Ahlburg memorandum is annexed to this Petition as Appendix F.

would be "in a Catch 22 situation." If ADC could get to a jury because of Copper State's complaints about its discount, Copper State could also get to a jury if it were terminated; it could argue that, because of its consistently lower prices, which displeased Braddock, ADC was chosen as the exclusive distributor. (App. C, p. 15a) Buckingham might then be forced to choose the anticompetitive alternative of keeping both wholesalers rather than risk a treble damages judgment.

The Court of Appeals

Ignoring Buckingham's dilemma, the Court of Appeals reversed. It conceded that ADC's evidence was "weak," but held that "there was sufficient circumstantial evidence to withstand the motion for a directed verdict." (App. B, p. 9a) The Court cited two pieces of evidence which it considered sufficient to take the case to the jury: (1) the "Ahlburg Memorandum" (App. F)—even though it contained no suggestion of an agreement, and (2) Gellerman's offer at a meeting with Ahlburg to make a "commitment" in exchange for the exclusive distributorship—even though Gellerman made no mention of price.

While relying on evidence which bore absolutely no relation to price fixing, the Court of Appeals ignored the most telling piece of evidence in the case—the Braddock letter in which ADC's president admitted that it would be in Buckingham's competitive self-interest to terminate one of its wholesalers. Apparently, the Court believed that evidence of procompetitive benefits was not pertinent to determining whether there was sufficient evidence of a conspiracy to fix prices. In fact, the most logical test for inferring concerted action from a termination is whether the termination was in the individual self-interest of the supplier, acting independently, or in the collective self-interest of the alleged co-conspirators only when they coordinate their actions.[4] In this case, all the evidence demonstrated that termination of one of its wholesalers was the only procompetitive option Buckingham had.

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4 See discussion at pages 10 & 15-16 *infra*.

REASONS FOR GRANTING THE WRIT

I.

This case will assist the Court in resolving definitively the questions only partially presented in *Monsanto Company* v. *Spray-Rite Service Corporation*.

In several significant respects, the facts in this case resemble those in *Spray-Rite Service Corporation* v. *Monsanto Company*, 684 F.2d 1226 (7th Cir. 1982), *cert. granted*, No. 82-914 (Feb. 28, 1983). The Seventh Circuit there held that mere evidence of price complaints about a distributor, coupled with the distributor's subsequent termination, warranted an inference of a vertical price-fixing conspiracy between the complaining distributors and the supplier, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. 684 F.2d at 1238. The supplier, Monsanto, petitioned for a writ of certiorari which this Court granted on February 28, 1983.[5]

Monsanto poses the narrow question:

> "Can a *per se* unlawful vertical price-fixing conspiracy be inferred solely from evidence that a manufacturer, concerned about resale prices, received price complaints from a distributor's competitors and later did not renew the distributor's contract?"[6]

Although resolution of that issue is important, it will be of limited utility to lower courts and to marketers since it is rare for there to be nothing beyond a price cut, a complaint and a termination. In the large majority of cases, there will be intervening communications about that price cut, and the

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5 The writ was granted only three days after the Ninth Circuit's decision was filed herein.

6 *Monsanto* also poses an additional and separate issue: "Should non-price vertical restrictions, normally tested under the rule of reason, be subjected to a *per se* rule merely because they are *alleged* to be part of a vertical price-fixing conspiracy?"

determinative question will concern the circumstances under which such communications may warrant an inference of conspiracy. That question, which is not presented in *Monsanto*, is squarely presented in the case at bar.

Complaints by wholesalers about other wholesalers' pricing practices are rarely ignored by suppliers. As the reported cases reveal, additional communications almost invariably ensue, both within the supplier's organization[7] and between the supplier and one or more of its wholesalers.[8] At the least, an internal report will be made. Such a report—the Ahlburg Memorandum (App. F)—was made here. Almost as often, the concerned supplier—unless chilled by antitrust decisions like the Ninth Circuit's below—will make routine inquiries, at least to determine what is happening in the marketplace. Such

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7 *See, e.g., Bostick Oil Co.* v. *Michelin Tire Corp.*, 1983-1 Trade Cas. (CCH) ¶ 65,271, at 69,594 (4th Cir. 1983); *Battle* v. *Lubrizol Corp.*, 673 F.2d 984, 986 (8th Cir. 1982), *rehearing en banc granted* (May 21, 1982); *The Sports Center, Inc.* v. *Riddell, Inc.*, 673 F.2d 786, 789 (5th Cir. 1982); *Contractor Utility Sales Co.* v. *Certain-Teed Prods., Inc.*, 638 F.2d 1061, 1074 (7th Cir. 1981); *H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935, 938 (2d Cir. 1981), *cert. denied*, 103 S. Ct. 176 (1982); *Girardi* v. *Gates Rubber Co. Sales Div'n, Inc.*, 325 F.2d 196, 200 (9th Cir. 1963); *A.G. Rogers Co.* v. *Merck & Co., Inc.*, 498 F. Supp. 5, 8 (E.D. Tenn. 1980); *Belk-Avery, Inc.* v. *Henry I. Siegel Co., Inc.*, 457 F. Supp. 1330, 1333-34 (M.D. Ala. 1978).

8 *See, e.g., Bostick Oil Co.* v. *Michelin Tire Corp.*, 1983-1 Trade Cas. (CCH) ¶ 65,271, at 69,594 (4th Cir. 1983); *Schwimmer* v. *Sony Corp. of America*, 677 F.2d 946, 948 (2d Cir.), *cert. denied*, 103 S. Ct. 362 (1982); *Contractor Utility Sales Co.* v. *Certain-Teed Products*, 638 F.2d 1061, 1074 (7th Cir. 1981); *H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935, 939 (2d Cir. 1981), *cert. denied*, 103 S. Ct. 176 (1982); *Oreck Corp.* v. *Whirlpool Corp.*, 639 F.2d 75, 80 (2d Cir. 1980), *cert. denied*, 454 U.S. 1083 (1981); *Westinghouse Elec. Corp.* v. *CX Processing Labs, Inc.*, 523 F.2d 668, 674 (9th Cir. 1975); *Girardi* v. *Gates Rubber Co. Sales Div'n, Inc.*, 325 F.2d 196, 201 (9th Cir. 1963); *Belk-Avery, Inc.* v. *Henry I. Siegel Co., Inc.*, 457 F. Supp. 1330, 1333 (M.D. Ala. 1978); *Schnapps Shop, Inc.* v. *H.W. Wright & Co.*, 377 F. Supp. 570, 575 (D. Md. 1973).

routine communications are "crucial to the operation of efficient distribution systems" and should be encouraged.[9]

At the risk of understatement, the law concerning the circumstances under which a vertical price-fixing conspiracy may be inferred from the communications preceding a termination is in a state of total confusion. There are not only conflicts among circuits,[10] but within circuits as well.[11]

The panel in *Monsanto*, for example, while holding that a conspiracy could be inferred from evidence that price complaints preceded a termination, did not seem to require the finding of a causal connection between the complaints and the termination. Another panel which seems to follow the *Monsanto* rationale clearly requires the showing of such a connec-

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9 Brief for the United States as Amicus Curiae on Petition for Writ of Certiorari, filed Jan. 3, 1983, at 9 & n.12, *Monsanto Co.* v. *Spray-Rite Service Corp.*, No. 82-914 (U.S.) ("Amicus Brief for the United States in *Monsanto*").

10 *Compare* the Seventh Circuit panel's decision in *Monsanto*, *supra*, 684 F.2d at 1238, *and Battle* v. *Lubrizol Corp.*, 673 F.2d 984, 991-92 (8th Cir. 1982), *rehearing en banc granted* (May 21, 1982), *with, e.g., Bruce Drug, Inc.* v. *Hollister, Inc.*, 688 F.2d 853, 856-57 (1st Cir. 1982); *Davis-Watkins Co.* v. *Service Merchandise*, 686 F.2d 1190, 1199 (6th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3421 (November 19, 1982) (No. 82-848); *Schwimmer* v. *Sony Corp. of America*, 677 F.2d 946, 953 (2d Cir.), *cert. denied*, 103 S. Ct. 362 (1982); *H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir. 1981), *cert. denied*, 103 S. Ct. 176 (1982); *Blankenship* v. *Herzfeld*, 661 F.2d 840, 844-45 (10th Cir. 1981); *and Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

11 *Compare* the Seventh Circuit panel's decision in *Monsanto*, *supra*, 684 F.2d at 1238, *with Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 678 F.2d 742, 744 (7th Cir. 1982); *Battle* v. *Lubrizol Corp.*, *supra*, 673 F.2d at 991-92, *with Roesch, Inc.* v. *Star Cooler Corp.*, 671 F.2d 1168, 1172 (8th Cir. 1982), *rehearing en banc granted* (May 21, 1982); *and Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, *supra*, 637 F.2d at 111, *with Cernuto, Inc.* v. *United Cabinet Corp.*, 595 F.2d 164, 168-170 (3d Cir. 1979).

tion.[12] Other panels, which reject the *Monsanto* rationale, take guidance from the analogy of parallel pricing cases and look to whether the termination was in the supplier's independent self-interest or only explicable as joint action.[13] The Department of Justice advocates the adoption of this test.[14] Still other panels have articulated no test and decide such cases on an *ad hoc* basis[15]—a position that has engendered a host of inconsistent decisions and provided the district courts and counseling attorneys little guidance. The decision below falls within this last group. Justice White has characterized "this disagreement in the circuits over the nature of proof required" as "especially significant." *Schwimmer* v. *Sony Corporation of America*, 103 S. Ct. 362, 363 (1982) (dissenting from denial of writs of certiorari).

Monsanto presents an opportunity to resolve some, but far from all, of the existing confusion. Because the facts in

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12 *Battle* v. *Lubrizol Corp.*, 673 F.2d 984, 992 (8th Cir. 1982), *rehearing en banc granted* (May 21, 1982).

13 *See Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 678 F.2d 742, 744 (7th Cir. 1982); *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 111, 114 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); *Bogosian* v. *Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978).

14 Amicus Brief for the United States in *Monsanto*, *supra*, at 8-9; Brief of the United States of America As Amicus Curiae on Rehearing En Banc, filed Oct. 1, 1982, at 5-11, *Battle* v. *Lubrizol Corp.*, No. 81-1585 (8th Cir.); Memorandum for the United States As Amicus Curiae Regarding Defendant's Motion for Summary Judgment, dated March 6, 1983, at 13-20, *O.S.C. Corp.* v. *Apple Computer, Inc.*, No. CV-81-6132-CBM (GX) (C.D. Cal.).

15 *Bostick Oil Co.* v. *Michelin Tire Corp.*, 1983-1 Trade Cas. (CCH) ¶ 65,271, at 69,596-98 (4th Cir. 1983); *Bruce Drug, Inc.* v. *Hollister Inc.*, 688 F.2d 853, 856-57 (1st Cir. 1982); *Schwimmer* v. *Sony Corp. of America*, 677 F.2d 946, 953 (2d Cir.), *cert. denied*, 103 S. Ct. 362 (1982); *H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir. 1981), *cert. denied*, 103 S. Ct. 176 (1982); *Roesch, Inc.* v. *Star Cooler Corp.*, 671 F.2d 1168, 1172 (8th Cir. 1982), *rehearing en banc granted* (May 21, 1982).

Monsanto show nothing more than complaints followed by termination, *Monsanto* does not provide the Court the record it needs to articulate a test that will resolve the larger question perplexing the courts below. This case provides just such a record and, in conjunction with *Monsanto*, presents an opportunity to settle the law in this important area.

Should the Court resolve nothing beyond the simple termination question raised in *Monsanto*, and defer consideration of the broader issue posed in *Buckingham*, the courts below will continue to decide termination cases on an inconsistent and largely *ad hoc* basis. Different rules will pertain in different markets—causing confusion and uncertainty, particularly in the handling of nationally distributed goods. Suppliers—sensitive to the risks of treble damage suits—will abstain from investigating conditions in the market and will make less informed decisions about how to structure distribution systems. Dialogue between suppliers and distributors—crucial to the maintenance of efficient systems of distribution—will be chilled.

In view of the great importance of resolving the broader issues posed by *Buckingham*, the Court should grant certiorari and hear *Monsanto* and *Buckingham* in tandem. Such a procedure, which the Court has often employed where different cases present similar questions,[16] would be in the interests of judicial administration. Because the legal issues the two cases present are so related, little additional burden would be placed on this Court's docket, while the burden of an important conflict in the circuits and the many resulting petitions for certiorari would be alleviated.[17]

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16 *See, e.g., NAACP* v. *Claiborne Hardware Co.*, 454 U.S. 1030 (1981); *Crawford* v. *Board of Educ. of Los Angeles*, 454 U.S. 892 (1981); *International Longshoremen's Assn.* v. *Allied Int'l, Inc.*, 454 U.S. 814 (1981); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 451 U.S. 906 (1981); *Diamond* v. *Diehr*, 445 U.S. 926 (1980).

17 Alternatively, the Court should hold this case for disposition following its decision in *Monsanto*. For the reasons stated above, we submit that this alternative course is much less preferable.

II.

The Ninth Circuit's decision below encourages anticompetitive behavior.

There was no dispute below that the existing distribution system for Buckingham's products in Arizona—*i.e.*, two wholesalers serving the same geographical market—was inefficient and that Buckingham's legitimate competitive interests would have been best served by terminating one of its wholesalers. Braddock, the president of ADC, admitted as much in a letter to Buckingham (App. E). Despite this evidence, the Ninth Circuit held that a *per se* unlawful vertical price-fixing conspiracy could be inferred from Buckingham's decision to terminate ADC.

In the aftermath of the *Buckingham* decision, a supplier in such circumstances faces a difficult choice: It may (1) terminate wholesaler A, (2) terminate wholesaler B, or (3) terminate neither wholesaler A nor B, thus perpetuating the inefficient status quo. Buckingham's dilemma was insoluble. Both Copper State and ADC had engaged in at least some price cutting—ADC for 10 days in April 1981 and Copper State consistently over several years. In each case, the higher priced wholesaler complained. Thus, either Copper State or ADC would have been able to argue that it was terminated as a result of its price cutting efforts and the supplier's communications with the other wholesaler.

After *Buckingham*, an attorney counseling a client that proposes to terminate a wholesaler in order to improve its competitive position must advise that terminating any wholesaler who has ever cut prices poses a substantial risk under the antitrust laws. After *Buckingham*, the option an attorney must counsel as the least risky is ironically the anticompetitive one—terminate neither distributor and preserve the inefficient status quo. In short, the *Buckingham* decision promotes anticompetitive behavior.

Viewed from the wholesalers' perspective, the *Buckingham* decision in practical effect provides wholesalers—regardless of their competitive merits—an antitrust insurance policy against termination. All an inefficient wholesaler need do to protect itself against termination is to cut prices for a brief period now and then. Some complaints will invariably be lodged with the supplier and inquiries will be made. Under *Buckingham*, nothing more is needed to reach a jury on a vertical price-fixing claim. With the threat of treble damages hanging over its head, the supplier will frequently dare not risk terminating the inefficient wholesaler.

This Court should not permit the antitrust laws to be used in this way.

III.

The Court of Appeals' decision is predicated upon basic errors of law and conflicts directly with decisions of other circuits and this Court.

The Court of Appeals' decision below rests upon two basic errors of law.

The court's first basic error was to conclude that a price fixing conspiracy could be inferred from two pieces of evidence that could not, as a matter of law, provide the basis for such an inference:

A. The Court of Appeals cited "the Ahlburg Memorandum" which said nothing about an agreement, but which the court suggested might evince "the pricing reasons for the termination." (App. B, p. 9a) Even if the court's interpretation of the Ahlburg Memorandum were correct—and the overwhelming weight of the evidence at trial indicated that Buckingham's principal reasons for terminating ADC were unrelated to price—it would have made no difference. Under this Court's decision in *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919), a supplier has every right to terminate a

wholesaler unilaterally for price reasons—even if those are its only reasons, which was not the case here. The issue is not the supplier's reasons, but whether an agreement existed.

B. The Court of Appeals also referred to testimony that the chief executive of Copper State offered to make a "commitment" in exchange for an exclusive distributorship. While acknowledging that this remark (taken entirely out of its context, which plainly indicated that the remark had nothing to do with prices) "might have only meant a commitment to sell the product aggressively," the Court of Appeals concluded that "a reasonable jury might have interpreted it as an offer to let Buckingham have some control over price." (App. B, p. 10a)

The only reference to such a "commitment" in the entire record is two pages of testimony by Ahlburg in which he reports that the president of Copper State requested an exclusive distributorship (as had the president of ADC) and offered to make the following "commitment" (Trial Tr., p. 713):

> "whatever it takes to build this brand I'm here to do it. I'll work."[18]

This testimony, far from suggesting the existence of an anticompetitive conspiracy, evidenced a willingness to engage in vigorous interbrand competition—precisely the kind of conduct the antitrust laws were primarily intended to foster. *See*

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18 The court below ignored the Ahlburg testimony which immediately followed (Trial Tr., pp. 713-14):

> "Q: Did Mr. Gellerman [Copper State's chief executive] make any promises at that meeting concerning his pricing of Cutty Sark?
>
> A: No.
>
> Q: Concerning his discounting of Cutty Sark?
>
> A: No.
>
> Q: Did you ask him for any commitments concerning pricing?
>
> A: No.
>
> Q: Concerning discounting?
>
> A: No."

Continental T.V., Inc. v. *GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19 (1977) ("Interbrand competition . . . is the primary concern of antitrust law."). No reasonable jury hearing this evidence could have construed this remark as an agreement to fix prices, without resorting to guesswork or conjecture which the District Court properly did not permit. *See Galloway* v. *United States*, 319 U.S. 372, 395 (1943).

Evidence of this type should not be the basis for inferring price fixing conspiracies. It it were, almost any termination of any distributor that had ever cut prices would inaugurate an antitrust litigation and get to a jury. Coupled with the allure of treble damage awards, such a lenient standard for finding a price fixing conspiracy would invite a host of antitrust actions.

In any event, the Ninth Circuit's holding simply cannot be reconciled with this Court's decisions in *Colgate*, *Sylvania* and *Galloway*.

The court's second error was to ignore entirely the most probative piece of evidence on the conspiracy issue: the Braddock letter (App. E). The Braddock letter acknowledged—and ADC never disputed—that terminating one of the two wholesalers in the Arizona market would promote interbrand competition.

The Court of Appeals' reasons for ignoring this critical piece of evidence are not disclosed in its opinion. The court apparently believed—erroneously—that evidence of procompetitive benefits was not to be considered in a case alleging price fixing, even in determining whether a conspiracy existed in the first place.

Whatever its reasoning, the court's conclusion—that a conspiracy may be inferred notwithstanding undisputed evidence that a termination was in the supplier's competitive self-interest—squarely conflicts with decisions in the Third and Seventh Circuits. *See Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 678 F.2d 742, 744 (7th Cir. 1982); *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 111, 114

(3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); *Bogosian* v. *Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978).

These cases hold that, in order to prove a vertical price-fixing conspiracy from evidence of communications between a supplier and a distributor followed by a termination, it must be shown that the termination was not in the independent self-interest of the supplier. The Department of Justice has strongly urged the adoption of this test in *amicus* briefs filed in three cases, including *Monsanto*, during the last year.[19] The Braddock letter—which ADC could not dispute because its president wrote it—demonstrated conclusively that terminating ADC was in Buckingham's competitive self-interest.

This Court should grant certiorari to correct the Ninth Circuit's errors and to resolve the conflict among the circuits thus presented.

IV.

A *per se* unlawful conspiracy should not be inferred from procompetitive conduct.

As a final reason for granting certiorari, we submit that the Ninth Circuit's decision below is at odds with the very purposes of the antitrust laws.

To hold that indisputably procompetitive conduct (terminating ADC) could be the basis for infering a presumptively anticompetitive conspiracy (vertical price fixing) is a contradiction in terms. Yet that is precisely what the court below did.

This contradiction cannot be reconciled with the rationale of *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977). The Court there eschewed such wooden applications of the per se rule to vertical conduct that is not plainly anticompetitive. "[D]eparture from the rule-of-reason standard," the

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19 *See* briefs cited in note 14 *supra*.

Court concluded, "must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." 433 U.S. at 58-59. Particularly where vertical relationships are involved, conduct should not be condemned as *per se* unlawful unless "economic and judicial experience have shown that [such conduct] invariably [has] a 'pernicious effect on competition' *and* lack[s] 'any redeeming [competitive] virtue.' "[20] In applying this rule, it must be kept in mind that "[i]nterbrand competition . . . is the primary concern of antitrust law." *Sylvania*, *supra*, 433 U.S. at 52 n.19.

There is no reason to assume that terminating a price cutting wholesaler—even where the supplier's reason for doing so is to maintain resale prices—will always have a "pernicious effect on competition" or lack "any redeming [competitive] virtue." The Braddock letter showed quite the contrary—that Buckingham was at a competitive disadvantage with two wholesalers in the Arizona market and that terminating one wholesaler would promote interbrand competition. That evidence demonstrates the error in applying the *per se* rule to Buckingham's decision to terminate ADC.

Even assuming *arguendo* that the termination was part of an agreement to maintain resale prices, we question whether the *per se* rule should apply to such vertical price restrictions, *see Dr. Miles Medical Co.* v. *John D. Park & Sons*, 220 U.S. 373 (1911), particularly where the effects of resale price maintenance on competition are, at most, speculative. The Department of Justice has asked this Court to consider that question in *Monsanto*.[21] In light of the undisputed procompetitive

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20 Amicus Brief for the United States in *Monsanto*, *supra*, at 16 (quoting *Sylvania*, *supra*, 433 U.S. at 49-50) (emphasis in original); *accord Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1, 19-20 (1979); *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 688, 692 (1978); *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958).

21 Amicus Brief for the United States in *Monsanto*, *supra*, at 15-18. Senior Justice Department officials and Department economists have

benefits of the termination here, we submit that this case provides an even better record on which to reconsider the rule of *Dr. Miles*.

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recently criticized the *Dr. Miles* rule. *Attorney General William French Smith's Remarks to District of Columbia Bar*, Antitrust & Trade Reg. Rep. (BNA) slip no. 1021, H-1, at H-2 (July 2, 1981); *Justice Drops Vertical Price Fixing, Mergers Cases Begun Within Last Year*, Antitrust & Trade Reg. Rep. (BNA) slip no. 1022, A-7, at A-8 (July 9, 1981) (William Baxter, Assistant Attorney General, Antitrust Division); *Vertical Restraints Can Increase Consumer Welfare: Antitrust Official*, Trade Reg. Rep. (CCH) slip no. 516, at 4 (November 16, 1981) (Ronald Carr, Deputy Attorney General Antitrust Division); Schwartz & Eisenstadt, *Vertical Restraints* 31-50 (Antitrust Division Economic Policy Office Discussion Paper 1982). Similar views have been expressed by the Director of the Federal Trade Commission's Bureau of Competition and prominent commentators. *See Interview with Thomas J. Campbell, Director of Bureau of Competition*, 43 Antitrust & Trade Reg. Rep. (BNA) slip. no. 1074, 238 (July 22, 1982); Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6, 8-14 (1981); Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. Chi. L. Rev. 1 (1977); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 Yale L.J. 373 (1966).

CONCLUSION

For the foregoing reasons, we ask the Court to grant a writ of certiorari to review the decision below and to set it down for argument in tandem with *Monsanto*. In the alternative, we ask the Court to hold consideration of this petition until a decision has been rendered in *Monsanto*.[22]

Dated: April 29, 1983

Respectfully submitted,

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22 In light of the similarities between the present case and *Monsanto* and the submission of an amicus brief by the United States in *Monsanto*, the Court may find it helpful to request an amicus brief from the United States with regard to Buckingham's petition. *See, e.g., Copperweld Corp.* v. *Independence Tube Corp.*, 51 U.S.L.W. 3684 (U.S. Mar. 21, 1983) (No. 82-1260).

APPENDICES

Appendix A

Listing pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States

The Buckingham Corporation
Affiliates*

Name of Affiliate	*Place of Incorporation*
DOMESTIC	
Allison Manufacturing Co.	Delaware
Arizona Sparkling Bottled Water, Inc.	California
Arrowhead Puritas Waters, Inc.	California
Aunt Nellie's Foods, Inc.	Wisconsin
B. L. Acquisition, Inc.	California
Beatrice Beverage Co.(1)	Delaware
Beatrice DISC, Inc.	Delaware
Beatrice Worldwide, Inc.	Delaware
Berliner & Marx, Inc.	New York
Bloomfield Industries, Inc.	Delaware
Brookside Enterprises, Inc.	California
Cal-Compack Foods, Inc.	Delaware
Certified Transportation Co., Inc.	California
County Line Cheese Company, Inc.	Delaware
Culligan DISC Company	Illinois
Culligan International Company(2)	Delaware
CWC Finance Corp.	Illinois
Dahlgren & Company	Delaware
Day-Timers, Inc.	Delaware
Edgar Packing Company, Inc.	Wisconsin
E. R. Moore Company	Delaware
Everpure, Inc.	Nevada
E. W. Kneip, Inc.	Delaware
Fiberite Corporation	Delaware
Fiberite West Coast Corporation	Delaware

* Each of the companies listed in this appendix is a subsidiary of Beatrice Foods, the parent company of The Buckingham Corporation.

Name of Affiliate	*Place of Incorporation*
Fiberite West Coast Leasing Corp.	Delaware
Fisher Nut Company	Delaware
Great Bear Spring Company	New Jersey
Harman Automotive, Inc.	Michigan
Harman Automotive—Puerto Rico, Inc.	Delaware
James J. Gallery, Inc.	Massachusetts
John Sexton & Co.	Delaware
Kelley Manufacturing Co.	Georgia
KSS Transportation Corp.	New Jersey
La Choy Food Products Company	Delaware
LouverDrape, Inc.	California
LouverDrape International, Inc.	Delaware
LouverDrape of New York	California
Mantecados Payco, Inc.	Delaware
Market Forge Co.	Delaware
Martha White Foods, Inc.	Tennessee
Melamine Plastic Corporation	Minnesota
Melnor Industries, Inc	New Jersey
Mid-America Container Corporation	Delaware
Minnesota Valley Engineering Inc.	Delaware
Mother's Cookie Company	Delaware
North East Cold Storage Corporation	Massachusetts
Pepcol Manufacturing Co.	Colorado
Peter Eckrich and Sons, Inc.	Delaware
Quincy Market Cold Storage and Warehouse Co.	Massachusetts
Rainbo Foods, Inc.	Delaware
St. John's, Inc.	Michigan
Samsonite Corporation(3)	Colorado
Samsonite Domestic International Sales Corporation	Colorado
Samsonite Inernational Sales Corp.	Colorado
Sanna, Inc.	Delaware
Stahl Chemicals S.A., Inc.	Massachusetts
Tannoy-Ortofon, Inc.	New York
Taylor Freezer Company	Delaware

Name of Affiliate	*Place of Incorporation*
The Buckingham Corporation	Delaware
The D. L. Clark Company	Delaware
Tindle Mills, Inc.	Missouri
Tropicana International, Inc.	Delaware
Tropicana Products, Inc.(4)	Florida
Waterloo Industries, Inc.	Iowa
Webcraft Games, Inc.	New Jersey
INTERNATIONAL	
Acabados Newark Stahl S.A. de C.V.	Mexico
Ailiram Productos Alimenticios S.A.	Brazil
Alimentos del Istma S.A.	Panama
Aliments Beatrice Quebec, Inc.	Canada
Anchor Japan Co., Ltd.	Japan
Artic France S.A.R.L.	France
Artic S.A.	Belgium
Artigel GmbH	West Germany
Atlantik GmbH	West Germany
B.C. Quimica Ltda.	Brazil
B.F.C. Industria e Comercio Ltda.	Brazil
B.F.C. Investments (Belgium) N.V.	Belgium
B.F. Finanziaria S.p.A	Italy
Beatrice Australia Ltd.	Australia
Beatrice Chemical Pte. Ltd.	Singapore
Beatrice Finance N.V.	Neth. Antilles
Beatrice Foods (Canada) Ltd.	Canada
Beatrice Foods Co. & Dr. Suwelack GmbH	West Germany
Beatrice Foods Co. (Middle East) Limited	Jersey, Channel Is.
Beatrice Foods (Ontario) Ltd.	Canada
Beatrice Foods (United Kingdom) Ltd.	United Kingdom
Beatrice Foods Finance (Europe) B.V.	Netherlands
Beatrice Foods Overseas Finance N.V.	Neth. Antilles
Beatrice International (Canada) Ltd.	Canada
Beatrice Foods (New Zealand) Ltd.	New Zealand

Name of Affiliate	*Place of Incorporation*
Beneke GmbH	West Germany
Beneke Industries Ltd.	Canada
Bettendorf Ltd.	Canada
Bloomfield Industries Canada Ltd.	Canada
Boquitas Fiestas, S.A. de C.V.	Honduras
Bronwater Import Kantoor Eindboven B.V	Netherlands
Cafeteria de Molsheim	France
Caramelos Royal S.A.	Venezuela
Caron B.V.	Netherlands
Chicago Specialty Mfg. of Canada Ltd.	Canada
Chitos International Y Cia Ltd.	Guatemala
Choice Confectionery Pty. Limited	Australia
Cremo Ltd.	Jamaica
Cremo Sales Ltd.	Jamaica
Culligan Italiana S.p.A.	Italy
Culligan Water Conditioning (Ontario) Limited	Canada
Dairyworld S.A	Switzerland
Daytimers of Canada Ltd.	Canada
De Forenede Isvaerker A/S	Denmark
Delite Foods Co., Ltd.	Thailand
Distribuidora Marsanita C.A.	Venezuela
Dwan Export, Ltd.	Ireland
Dwan Manufacturing, Ltd.	Ireland
Elnagh S.p.A.	Italy
Eric's Swiss Products, Inc.	Puerto Rico
Etablissements Baud S.A.	France
Euroma Ten Doesschate B.V.	Netherlands
Europe Strength Food Co. Pty. Ltd.	Australia
Eurosnax International Ltd.	Ireland
Everpure Ltd.	Ireland
Exthene Pty. Ltd.	Australia
Finance Corporation of Jamaica Ltd.	Jamaica
Food Producers Canada Ltd.	Canada
Foods and Services S.A	Switzerland
Frigor C. por A.	Dominican Republic

Name of Affiliate	*Place of Incorporation*
Gelati Sanson S.p.A.	Italy
Granos de Oriente C.A.	Venezuela
Handelsmaatschappij Winters B.V.	Netherlands
Harman International Industries GmbH	West Germany
Helados Canarios S.A.	Spain
Holanda S.A. de C.V.	Mexico
Home Pac Limited	United Kingdom
Industrias Anita C.A.	Venezuela
Industrias Benco C.A.	Venezuela
Industrias Gran Colombia S.A.	Colombia
Industrias Savoy C.A.	Venezuela
Interglas S.A.	Spain
Internacional Olivarera	Spain
Jack's Amazonia Industria de Alimentos Ltda.	Brazil
King Foods Export Ltd.	Ireland
King Foods Ltd.	Ireland
King Kandy Limited	Ireland
Koninklijke Frisdranken Industrie Winters B.V.	Netherlands
LNF Plastics (Nederland) B.V.	Netherlands
L. V. Patteson Ltd.	Canada
Lancelot Furniture Ltd.	United Kingdom
Les Fromages Crescent Ltd.	Canada
LouverDrape of Canada Limited	Canada
Manassen Lucchitti Co. Pty. Ltd.	Australia
Marlon C.A	Venezuela
Melnor GmbH	West Germany
Melnor Manufacturing Ltd.	Canada
Melnor N.V	Belgium
Metallic Lubricants Limited.	Canada
Metallic Lubricants Limited.	Taiwan
Modern Dairies Limited	Canada
Modernas Applicaciones de la Refrigeracion Industrial S.A.	Spain

Name of Affiliate	*Place of Incorporation*
Nergico-Belgique S.A.	Belgium
Nergico S.A.	France
North Shore Dairies Ltd.	Jamaica
Park City Products Ltd.	Canada
Polyvinyl Chemie (Holland) N.V	Netherlands
Pop Snax Pty. Ltd.	Australia
Pork Puffs Ltd.	Canada
Potato Distributors Ltd.	Ireland
Premier IS A/S	Denmark
Primalp S.A.	Switzerland
Productos Alimenticios Rene S.A.	Guatemala
Productos Chipy S.A.	Peru
Quan S.A. de C.V.	Mexico
Quimica Stahl Centroamericana (Nicaragua), S.A	Nicaragua
Red Tulip Chocolates Pty. Ltd.	Australia
Red Tulip Confectionery Dist. Services (S.A.) Pty. Ltd.	Australia
Red Tulip Distrib. Serv. (N.S.W.) Pty. Ltd.	Australia
Red Tulip Distrib. Serv. (QLD.) Pty. Ltd.	Australia
Red Tulip Distrib. Serv. (VIC.) Pty. Ltd.	Australia
Red Tulip Distrib. Serv. (W.A.) Pty. Ltd.	Australia
Red Tulip Imports Pty. Ltd.	Australia
Samsonite Industrial e Commercial Ltda.	Brazil
Sandt Printing Co., Ltd.	Canada
Sedipro S.A.	France
Smith Kendon Ltd.	United Kingdom
Societe Corr. de Prod. Alimentario Socalim S.A.	France
Societe d'Exploitation des Etablissements Boizet & Barraud, S.A.	France
Societe Europeenne de Supermarches S.A.	France
Societe Pour la Rationalisation Industrielle Imperial S.A.R.L.	France
Sodeca S.A.R.L.	France

Name of Affiliate	*Place of Incorporation*
Stahl Armstrong Pty. Ltd.	Australia
Stahl Asia Trading Pte. Ltd.	Singapore
Stahl Chemical Asia Pte. Ltd.	Singapore
Stahl Chemicals (G.B.) Ltd.	United Kingdom
Stahl Chemicals Industries B.V.	Netherlands
Stahl Chemische Industrien B.V. GmbH	Austria
Stahl Iberica S.A.	Spain
Stahl Italia S.R.L	Italy
Stahl Polyvinyl Chemie GmbH	Germany
Stahl Polyvinyl International B.V.	Netherlands
Stark's Chocolate Investment Pty. Ltd.	Australia
Stark's Confectionery Limited	Australia
Sunco N.V.	Belgium
Tayto Ltd.	Ireland
Ten Doesschate B.V	Netherlands
Tendo Haco Farmacie B.V.	Netherlands
The Baron's Table Specialty Meats Pty. Ltd.	Australia
Thoro N.V.	Belgium
Tribol-Culligan GmbH, Chemotecknik	West German
Unicorp Pty. Ltd.	Australia
Van Camp Chocolate Ltd.	New Zealand
Water Conditioning Finance Limited	Canada
W.J. Dwan & Sons Ltd.	Ireland
W.J. Dwan & Sons (Athlone) Ltd.	Ireland
World Dryer Co. Ltd.	Canada
Yomix Pty. Ltd.	Australia

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 81-6046, 82-5241

D.C. No. CIV 81-1028 PHX CLH

THE BUCKINGHAM CORPORATION,
a Delaware corporation,

Plaintiff,

—v.—

THE ODOM CORPORATION, a Delaware corporation,
dba ARIZONA DISTRIBUTING COMPANY,

Defendant,

THE ODOM CORPORATION,
dba ARIZONA DISTRIBUTING COMPANY,

Counterclaimant/Appellant,

—v.—

THE BUCKINGHAM CORPORATION; MAZEL CORPORATION,
an Arizona corporation; COPPER STATE DISTRIBUTORS,
INC., an Arizona corporation,

Counterdefendants/Appellees.

MEMORANDUM

Argued and Submitted—October 15, 1982
Decided—February 25, 1983

Appeal from the United States District Court
for the District of Arizona
Honorable Charles L. Hardy, District Judge, Presiding

Before: POOLE and BOOCHEVER, *Circuit Judges*, and MCNICHOLS,* *Senior District Judge*.

Buckingham sued Odom for a declaratory judgment that its termination of Odom as a liquor distributor was lawful under the Sherman Act. The district court granted a directed verdict for Buckingham but denied it attorney's fees for defending various state law claims brought by Odom. Both sides appeal.

Although Odom's evidence was weak, there was sufficient circumstantial evidence of concerted action to withstand the motion for a directed verdict. Arizona law may provide for attorney's fees in cases such as this. We therefore reverse and remand.

In this case, the standard of review is critical. In considering a motion for directed verdict, the controlling inquiry is whether, viewing the evidence as a whole, there is substantial evidence present that could support a finding, by reasonable jurors, for the nonmoving party (i.e., Odom). *United California Bank v. THC Financial Corp.*, 557 F.2d 1351, 1356 (9th Cir. 1977). The evidence is viewed in the light most favorable to the nonmoving party. *Cullinan v. Burlington Northern, Inc.*, 522 F.2d 1034, 1036 (9th Cir. 1975).

Buckingham presented evidence that it terminated ADC in its independent discretion and for legitimate business reasons unrelated to price. This evidence included Buckingham's desire to upgrade the Cutty Sark image, its desire for an eager distributor to whom Buckingham's brands would be important, the results of the wine contest, the comparison of growth in Cutty Sark sales prior to the April discount, the "Ceccarelli" testimony, and the Finlandia discount.

Viewing the evidence in the light most favorable to Odom, however, we find that there was sufficient evidence to support a jury verdict in its favor by reasonable persons. Particularly persuasive are the "Ahlburg Memorandum" which focused on the pricing reasons for the termination, and Gellerman's offer to make a "commitment" in exchange for an exclusive distrib-

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* Honorable Ray McNichols, Senior United States District Judge for the District of Idaho, sitting by designation.

utorship. While Gellerman might have only meant a commitment to sell the product aggressively, a reasonable jury might have interpreted it as an offer to let Buckingham have some control over price. We therefore conclude that the district court erred in granting a directed verdict.

Odom brought a counterclaim based on the Arizona Spirituous Liquor Franchises Act, Ariz. Rev. Stat. Ann. §§ 44-1565-44-1567 (West Supp. 1982), which it later abandoned. Section 44-1567 makes an award of attorney's fees to the "prevailing party" mandatory. Thus, if Buckingham prevailed, it was error for the district court not to award attorney's fees on the Franchise Act claim. But it is not clear whether to be a "prevailing party" under Arizona law it is enough that the party prevailed on the Franchise Act claim alone, rather than in the case as a whole. The district court should initially decide this issue of Arizona law. Since it is necessary to remand for a new trial, determination of whether to make an award of attorney's fees and, if one is made, the reasonable amount, must await the outcome.

Odom also brought a counterclaim based on a theory of implied contract. Ariz. Rev. Stat. Ann. § 12-341.01(A) (West 1982) provides that "[i]n any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney's fees." Buckingham was granted a directed verdict on the implied contract action.

Section 12-341.01 has a stated purpose of "mitigat[ing] the burden of the expense of litigation to establish a just claim or a just defense." Ariz. Rev. Stat. Ann. § 12-341.01(B); *Shirley v. Hartford Accident & Indemnity Co.*, 125 Ariz. 70, 607 P.2d 389, 390 (Ct. App. 1979). Therefore, in the light of the remedial nature of the statute, *Nationwide Mutual Insurance Co. v. Granillo,* 117 Ariz. 389, 573 P.2d 80, 86 (Ct. App. 1977), the court may have abused its discretion in not granting attorney's fees.

Again, it is not clear whether to be "successful" Buckingham must succeed in the case as a whole or if it is enough to succeed on the implied contract claim alone. At the conclusion of the trial, the district court should determine this issue.

Section 12-341.01(B) expressly states that reasonable attorney's fees need not equal or relate to actual attorney's fees. Therefore, if the district court awards attorney's fees on the implied contract claim, it must determine what amount would be reasonable.

REVERSED and REMANDED.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No CIV 81-1028 PHX CLH

THE BUCKINGHAM CORPORATION,
a Delaware corporation,

Plaintiff,

—v.—

THE ODOM CORPORATION, a Delaware corporation,
d/b/a ARIZONA DISTRIBUTING COMPANY,

Defendant.

Before: THE HONORABLE CHARLES L. HARDY
Judge of the United States District Court

APPEARANCES:

For the Plaintiff:
Mr. Jay Greenfield
Mr. Richard D. Friedman
Attorneys at Law

For the Defendant:
Mr. Daniel S. Mason
Mr. Craig Corbitt
Attorneys at Law

For Mazel Corp. and
Copper State Distributing
Mr. Daniel J. McAuliffe
Attorney at Law

November 24, 1981
Phoenix, Arizona
A. M. Session

[807]*

IN OPEN COURT (NO JURY PRESENT)

PROCEEDINGS

THE COURT: Yesterday I had my secretary call you and tell you that I was proposing to deny the motion on the counter-defendants, Buckingham and Copper State, on the antitrust claims, grant it on the implied contract claim. I really have now concluded I ought to direct a verdict on the antitrust claims.

I'd like to try to articulate my reasons. We start out with the proposition that everybody agrees here that there should only be one Cutty Sark distributor in Arizona. And the evidence seems to be undisputed when the new management took over Buckingham in late 1980 they became cognizant of the desirability of having one distributor but decided because they did not know either ADC or Copper State to wait and observe how these two companies operated.

I believe Mr. Alburg testified that even before April he was beginning to lean towards Copper State. And then in April we have the—I use the term "famous discount" by ADC, which it can be said, I think, that Mr. Gellerman complained to both Mr. Lichtenberger—well, initially to Mr. Lichtenberger then later talked to Mr. Alburg about it. While it's disputed, said, "What are you going to do about it?"

[808]

Mr. Alburg told him that he would propose to recommend that Copper State become the exclusive distributor. That was on the 28th of April. And on the 29th, after Mr. Alburg had returned to his office in Los Angeles, he talked to Mr. Karp in New York. He told him of his conversations with Mr. Braddock and Mr. Gellerman, and then wrote the memorandum, which is Exhibit 101, in which he recommended that Copper State handle the complete line on an exclusive basis.

---

* Bracketed numbers refer to pages in the Reporter's Transcript of Proceedings.

I need to back up a little. On the 28th when Mr. Alburg was in Phoenix he told Mr. Braddock that Buckingham disapproved of these so-called deep discounts. And again there is a dispute in the testimony. He told him that Buckingham would like to have a voice in the programming of the sales of Cutty Sark.

There was apparently some evidence the word "program" was not used, but the discounts, or the prices, I'm not quite sure.

In any event, whatever was said, I can't find that what Mr. Alburg said to Mr. Braddock was coercive. And then, frankly, I can't find anything in the evidence from which to support a finding that Mr. Gellerman agreed that if he had the exclusive he would follow Buckingham's suggestions as to prices to be placed on the Buckingham products.

Then, what is really compelling to me, is this: If we could find an understanding between Alburg and Gellerman that [809] if he would get the exclusive distributorship then Gellerman would agree to follow Buckingham's price suggestions, if we could find that kind of an agreement—I can't see how that is an agreement of Buckingham's, because Alburg has no authority to make that agreement, the decision as to who is to be the exclusive distributor is Mr. Karp's decision, and I just don't see how he made a decision—how his decision in August was the product of any agreement on his part to give the exclusive distributorship to Gellerman, or to Copper State if Copper State would maintain its prices in accordance with Buckingham's suggestions.

Furthermore, there are a lot of cases which say that a supplier can always terminate his distributor provided that the reason, whether it's the sole reason or overriding reason or substantial reason, is not an anti-competitive one. But I suspect that in many of those cases they are cases where the suppliers are in a truly competitive market; for example, a Texaco station which for one reason or another starts undercutting, you know, selling at a lower price than all the other Texaco dealers in town, and is terminated for that reason. But here everybody agrees that there should only be one distribu-

tor. And, really, Buckingham is in a Catch 22 situation. If they give it to ADC then Copper State complains that it's done because they were lower. And, by the way, we've got the same conversations, the same—well, not the complaints, but we've [810] got the urging from Mr. Braddock in behalf of ADC to Buckingham that Arizona is just not big enough for two, it can't get proper attention.

So, as I say, Buckingham is in a no-win situation in this case, and where everybody agrees that there should only be one distributor, and Buckingham decides to give it to Copper State, how—really, how can it be an anti-competitive decision, a decision to eliminate competition? How can it be a restraint of trade?

* * *

[888]

THE COURT: I'm going to grant the motion. I have come to the conclusion there is no evidence to show these parties acted in concert, and I'm going to grant the motion.

* * *

(Whereupon the jury is returned to the courtroom.)

THE COURT: Ladies and gentlemen, I've granted a motion for directed verdict which means that I have ruled that there is nothing to go to the jury in the case. That puts you out of a job.

In this case ADC had to show that Copper State and Buckingham acted together, what the law calls acting in concert to restrain trade, but I can't find any evidence to support that kind of conclusion. On that basis I have granted a motion for directed verdict.

Appendix D

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CIV 81-1028 PHX CLH

THE BUCKINGHAM CORPORATION, a Delaware corporation,

Plaintiff,

—VS.—

THE ODOM CORPORATION, a Delaware corporation, d/b/a ARIZONA DISTRIBUTING COMPANY,

Defendant.

THE ODOM CORPORATION, a Delaware corporation, d/b/a ARIZONA DISTRIBUTING COMPANY,

Counterclaimant,

—VS.—

THE BUCKINGHAM CORPORATION, a Delaware corporation; MAZEL CORPORATION, an Arizona corporation; and COPPER STATE DISTRIBUTORS, INC., an Arizona corporation,

Counterdefendants.

JUDGMENT

This action came on for trial before the Court and a jury, the Honorable Charles L. Hardy, United States District Judge, presiding, and the issues having been duly tried, and the Court having directed the verdict, and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the Motion for Directed Verdict of Plaintiff-Counterdefendant, The Buck-

ingham Corporation, and Counterdefendant Mazel Corporation, doing business as Copper State Distributors, Inc., is granted and that they take nothing by their counterclaim.

IT IS FURTHER ORDERED that Plaintiff-Counterdefendant have declaratory judgment against Defendant-Counterclaimant declaring that its termination of Defendant-Counterclaimant's franchise was not in violation of Arizona law.

Dated at Phoenix, Arizona this 10th day of December, 1981.

W.J. FURSTENAU, CLERK

By /S/ (Signature Illegible)
Deputy Clerk

Appendix E

(Letterhead of Arizona Distributing Company)

March 19, 1980

Mr. Robert Fine
The Buckingham Corporation
11777 San Vincente Blvd.
Suite 620
Los Angeles, CA. 90049

Dear Bob:

With the possible sale of Copperstate in the near future, it brings back to my mind our past conversation about dual items in the Arizona market. I have always felt that the dual items suffer from a lack of salesmen's interest. There are only a handful of dual items in this market and the salesman always has an exclusive item to push in place of any brand which also may be handled by a competitor.

If you would consider moving your entire line back to the Arizona Distributing Company I would personally assure you substantial increases in volume.

All the wines would be put on the "Arizona side" of the sales force and be handled by our chain division. I am confident that we could increase Mouton Cadet sales by 30 to 40 percent, the first year.

I am also sure that Cutty Sark sales could be increased by 10 to 15%, if we were the exclusive distributor.

Bob, our state is not a healthy environment for dual merchandise and I am sure your sales figures would be impressive if you made the move to Arizona Distributing.

Many thanks for your consideration.

Sincerely

JACK

J.T. Braddock
President

jtb/les

Appendix F

MEMORANDUM

PERSONAL & CONFIDENTIAL

Date: April 29, 1981

Steve Karp
From: Ken Ahlburg

ARIZONA

The state of Arizona is too small for two wholesalers selling our line. Forgetting all the standard cliches, shelf management is non-existent and uniform marketing that gets results cannot be coordinated with a dual.

This month, Arizona Distributors had a 5 case discount of $15.00 off on Cutty Sark (see attached), coupled with April being a buy-in, makes no sense. Plus, 5 case discounts do not get floors, 50 and 100 case discounts get the action. We sold a lot of goods in but the action to the consumer is not there.

I spoke with Jack Braddock regarding this, and his reason was that he felt that Copper State was always beating his deal by a dollar. By doing this, he would "show Copperstate".

In my opinion, "Showing Copper State" can and will be very detrimental to our over-all long term marketing of Cutty Sark.

I also spoke to Bernie Gellerman and he swears he has not been doing any such pricing.

I am recommending we have Copper State handle our complete line on an exclusive basis.

Regards,

KEN

KA:hb

No. 82-1787

Office - Supreme Court, U.S.
FILED
MAR 26 1984
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE BUCKINGHAM CORPORATION,

Petitioner,

—v.—

THE ODOM CORPORATION,
d/b/a ARIZONA DISTRIBUTING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

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THE BUCKINGHAM CORPORATION,

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, The Buckingham Corporation ("Buckingham"),[1] submits this supplemental brief to call the Court's attention to a conflict between the Court's recent decision in *Monsanto Co.* v. *Spray-Rite Service Corp.*, No. 82-914, slip op. (March 20,

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1 Petitioner is a wholly owned subsidiary of Beatrice Foods Company ("Beatrice"). As a result of a corporate reorganization of Beatrice and its subsidiaries, The Buckingham Corporation (the original petitioner) has been dissolved and a new corporation incorporated in the same state (Delaware). That new corporation now bears the name of The Buckingham Corporation and has succeeded to the original petitioner's interest in this action.

1984) and the decision of the Court of Appeals below in this case. In *Monsanto*, this Court enunciated the proper standard of proof required to submit a case to the jury in a distributor-termination action in which price fixing is alleged. The *Monsanto* decision makes it clear that the District Court below correctly concluded that there was insufficient evidence of a vertical price-fixing agreement to go to a jury and that the Court of Appeals erred in upsetting the District Court's directed verdict for Buckingham.

I.

The Facts and Proceedings Below

The facts and proceedings below in this case are described more fully in Buckingham's Petition for Writ of Certiorari ("Petition"), pp. 2-6. In brief, this is an antitrust case arising from the termination of Arizona Distributing Company ("ADC")—a division of Respondent at the time of trial—as one of two wholesalers of Buckingham's products in Arizona. ADC claimed in the District Court that its termination was the result of a price-fixing conspiracy between Buckingham and Copper State Distributors, Inc. ("Copper State"), Buckingham's other Arizona wholesaler.[2] At the close of ADC's case, the District Court, concluding that "there [was] no evidence to show that these parties acted in concert," directed a verdict dismissing ADC's price fixing claims. Conceding that ADC's evidence was "weak," the Court of Appeals nevertheless reversed on the ground that "there was sufficient circumstantial evidence" to go to a jury. (Petition App. B, p. 9a) The Court of Appeals emphasized two pieces of evidence discussed below.

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2 The nonprice reasons for Buckingham's termination of ADC are summarized at pages 3-4 of Buckingham's Petition.

II.

The *Monsanto* Decision

In *Monsanto*, this Court declared the proper standard of proof required in distributor termination cases to submit a case to the jury on price-fixing claims:

> "There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. As Judge Aldisert has written, the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' *Edward J. Sweeney & Sons,* [*Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 111 (CA3 1980), cert. denied, 451 U.S. 911 (1981)]; accord *H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935, 941 (CA2 1981) cert. denied, 459 U.S. 880 (1982); cf. *American Tobacco Co.* v. *United States*, 328 U.S. 781, 810 (1946) (Circumstances must reveal 'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement')."

Slip op. at 9-10. In a footnote, the Court explained:

> "The concept of 'a meeting of the minds' or 'a common scheme' in a distributor-termination case includes more than a showing that the distributor conformed to the suggested price. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer."

Id. at 10 n.9.

The Court held that the Court of Appeals below had applied too lenient a standard of proof to determine whether there was sufficient evidence to go to a jury, but affirmed the judgment of the Court of Appeals under the announced standard as applied to the facts at issue. The Court concluded that there

was "substantial *direct* evidence of agreements to maintain prices." Slip op. at 10 (emphasis in original). This evidence included (1) extensive evidence of threats by Monsanto not to provide adequate supplies to distributors that did not adhere to its suggested retail prices; (2) a newsletter from a distributor to its dealer-customers indicating that an agreement existed among Monsanto and its distributors that minimum prices would be maintained and non-complying distributors would be terminated; and (3) an illegal joint boycott of Spray-Rite after its termination. Slip op. at 10-13 & n.13. There was also evidence that Monsanto officials "made explicit threats to terminate Spray-Rite unless it raised its prices." *Id.* at 13.[3]

III.

The Conflict Between *Monsanto* and *Buckingham*

The admittedly "weak" evidence in Buckingham (*see* Petition App. B, p. 9a) does not approach that which was found sufficient to raise a jury question in *Monsanto*. There was no evidence in *Buckingham* of threats or an agreement to maintain prices;[4] nor, as the District Court concluded, was there evidence to support a finding that Buckingham and Copper State acted in concert. The Court of Appeals identified two pieces of evidence which it considered sufficiently "persuasive" to take the case to the jury. Both pieces of evidence, however, are plainly insufficient under the standard of proof announced by this Court in *Monsanto*.

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3 Much of this evidence was not discussed in the Court of Appeals' opinion in *Monsanto*, which stressed evidence of complaints followed by termination. Hence this evidence was not addressed in Buckingham's petition last spring.

4 Even the Respondents' adversarial statement of the record (Br. in Opp. to Petition 2-5) shows that there were no threats and no suggestions of future pricing by Buckingham.

First, the Court of Appeals cited an internal Buckingham memorandum ("the Ahlburg Memorandum"),[5] which said nothing about an agreement, but which the Court suggested might evince "the pricing reasons for the termination." (Petition App. B, p. 9a) Even if the Court of Appeals' interpretation of the Ahlburg Memorandum were correct—and the overwhelming weight of the evidence at trial indicated that Buckingham's principal reasons for terminating ADC were unrelated to price[6]—it would have made no difference. As this Court stressed in *Monsanto*, a supplier has every right to terminate a wholesaler unilaterally for price reasons—even if those are its only reasons, which was not the case here. Slip op. at 6, 8 (citing *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919)). The issue is not the supplier's reasons for terminating a distributor, but whether a price-fixing agreement existed with the nonterminated distributor.

Second, the Court of Appeals also referred to testimony that the chief executive of Copper State offered to make a "commitment" in exchange for an exclusive distributorship. While acknowledging that this remark (taken entirely out of context, which plainly indicated that the remark had nothing to do with prices) "might have only meant a commitment to sell the product aggressively," the Court of Appeals concluded that "a reasonable jury might have interpreted it as an offer to let Buckingham have some control over price." (Petition App. B, p. 10a) The only reference to such a "commitment" in the entire record is two pages of testimony by Ken Ahlburg, Buckingham's Western Division Manager, in which he reports that the president of Copper State requested an exclusive distributorship (as had the president of ADC) and offered to make the following "commitment" (Trial Tr., p. 713):

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5 Annexed to Buckingham's Petition as Exhibit F.

6 See Buckingham's Petition at 3-4.

"whatever it takes to build this brand I'm here to do it. *I'll work.*"

(Emphasis added).[7]

This testimony does not in any way suggest "a conscious commitment to a common scheme designed to achieve an unlawful objective." Indeed, it shows a desire to engage in vigorous interbrand competition—precisely the kind of conduct the antitrust laws were primarily intended to foster. *See Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19 (1977) ("Interbrand competition . . . is the primary concern of antitrust law"). No reasonable jury hearing this evidence could have construed this remark as an agreement to fix prices, without resorting to guesswork or conjecture which the District Court property did not permit. *See Galloway* v. *United States*, 319 U.S. 372, 395 (1943); *see also Monsanto*, Slip. Op. at 8 ("If an inference of such an agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunicated in *Sylvania* and *Colgate* will be seriously eroded").

As this Court emphasized in *Monsanto*, "it is of considerable importance that independent action by the manufacturer, and concerted action on nonprice restrictions, be distinguished from price-fixing agreements, since under present law the latter are subject to per se treatment and treble damages." Slip Op. at 8. The Court of Appeals below erred in not drawing this crucial distinction. The evidence of independent nonprice reasons for Buckingham's decision to select Copper State as its exclusive distributor was overwhelming and, by and large,

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7 The Court of Appeals ignored the Ahlburg testimony which immediately followed (Trial Tr., pp. 713-14):

"Q: Did Mr. Gellerman [Copper State's chief executive] make any promises at that meeting concerning his pricing of Cutty Sark?
A: No.
Q: Concerning his discounting of Cutty Sark?
A: No.
Q: Did you ask him for any commitments concerning pricing?
A: No.
Q: Concerning discounting?
A: No."

uncontradicted.[8] The evidence that Buckingham was concerned about the prices ADC charged and that the president of Copper State committed to work to build its supplier's brands simply does not "tend[] to exclude the possibility that [Buckingham] and [Copper State] were acting independently." *Monsanto*, Slip Op. at 9. Thus, the evidence was insufficient to permit a jury to find an unlawful price-fixing conspiracy under Section 1 of the Sherman Act.

The Respondent's adversarial statement of the record cites no other evidence—direct or circumstantial—which would support the Ninth Circuit's decision. The fact is, as the District Court concluded, that there was no evidence of concerted unlawful action by Copper State and Buckingham. In sum, the evidence below does not even approach that required under this Court's decision in *Monsanto*. Indeed, in view of the absence of any probative evidence to support the Court of Appeal's judgment, this is an appropriate case for summary reversal.

---

8 *See* Buckingham's Petition at 3-4. Indeed, ADC's President acknowledged that Buckingham's practice of selling its products through two distributors in Arizona placed it at a significant competitive disadvantage in a market where exclusive distributorships were the rule. *See* Buckingham's Petition at 3 and App. E thereto.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition and Reply Brief, we ask that the petition for writ of certiorari be granted and suggest that the judgment of the Court of Appeals below be reversed summarily. At the least, the Court should reverse and remand *Buckingham* for reconsideration in light of its decision in *Monsanto*.

Dated: March 26, 1984

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
MAY 17 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1787

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE BUCKINGHAM CORPORATION

Petitioner,

v.

THE ODOM CORPORATION,
d/b/a Arizona Distributing Company,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED

Petitioner's Questions 1, 2, and 3 are based upon incorrect characterizations of the evidence and of the court of appeals' holding. Question 4 was not raised below, and Question 5 is not a "question" at all. The only question which properly could be stated in light of the record below is the following:

Did the court of appeals err in holding that there was sufficient circumstantial evidence of concerted action to withstand the motion for a directed verdict?

PARTIES TO THE PROCEEDINGS

The Arizona Distributing Company division of The Odom Corporation was sold to Foremost-McKesson Inc. on March 8, 1983. The entity is now known as McKesson Wine & Spirits dba Arizona Distributing Company. The Odom Corporation retained all causes of action relating to this case.

The subsidiaries of The Odom Corporation are: Campco, Alaska, Inc.; Campco Pacific, Inc.; Clearwater Beverage, Inc.; Famous Brands, Inc.; and S & D Investments, Inc.

Petitioner's parent and affiliates are listed in the Petition. In addition to petitioner and respondent, the parties in the court below included Copper State Distributors, Inc. and Mazel Corporation. These parties also have an interest in the outcome of the appeal. Upon information and belief, the parents and affiliates of Mazel Corporation and Copper State Distributors include: Peerless Importers, Inc.; Johnny Barton, Inc.; All American Distributing Co., Inc.; and Klick Distributing Co.

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No. 82-1787

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE BUCKINGHAM CORPORATION

Petitioner,

v.

THE ODOM CORPORATION,
d/b/a Arizona Distributing Company,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION

The issue presented for review in this case is simply whether the court of appeals properly held, after reviewing the evidence in the light most favorable to respondent, that a directed verdict should not have been granted. This is a factual question which has no importance beyond this case. The court of appeals did not consider its decision significant enough to publish, and did not discuss any of the so-called questions listed in the Petition. In an effort to create an issue worthy of this Court's attention, petitioner recasts the evidence in its favor, contorts the holding of the court of appeals, grasps at the coattails of another case pending in this Court, and presents questions which were not raised below.

COUNTERSTATEMENT OF THE CASE[1]

Petitioner's selective recitation of the "facts," nearly devoid of record citation, ignores the principle that respondent is entitled to have all reasonable inferences drawn in its favor. [2]

I.

Respondent's Termination.

Through its former subsidiary, Arizona Distributing Company ("ADC"), respondent introduced Cutty Sark scotch whiskey to the state of Arizona, and distributed it continuously until its distributorship was terminated in 1981. Tr. 196-97. During that time, relying on petitioner's representation of a "partnership," respondent expended over $800,000 for local advertising of the product, notwithstanding petitioner's total control over such expenditures; as a result, Cutty Sark was unprofitable to respondent. Tr. 198-201, 236, 257, 283. Nevertheless, Cutty Sark was a "necessary evil," because as one of the "big four" premium scotches (Pet., p. 5; Tr. 81), it was a "door opener" for the remainder of respondent's products. Tr. 201-02. Until 1981, the business relationship between petitioner and respondent was "outstanding." Tr. 406-07, 412-13; Exh. 12. Respondent played a large role in helping to build Cutty Sark into one of the leading brands of scotch whiskey in the country. Tr. 199.

When new management assumed control in late 1980, petitioner underwent a major change in its pricing philosophy. Richard Newman, petitioner's new president, insisted that Cutty Sark pricing be "firmed up" to be "in line" with the other premium scotches: J & B, Johnnie Walker Red, and Dewar's. Pricing of Cutty Sark had been "bastardized," according to Newman, because "wholesalers were competing against each

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[1] The following abbreviations are used in this brief: "Tr." (trial transcript); "Exh." (trial exhibit); "CR" (district court docket number); "Pet." (Buckingham's Petition for Certiorari); "Pet. App." (Appendix to Petition); "Resp. App." (Appendix to this brief).

[2] Pet. App. B, p. 9a; *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962); *Cullinan v. Burlington Northern, Inc.*, 522 F.2d 1034, 1036 (9th Cir. 1975).

other." Tr. 409-10, 417. Petitioner's objective was to establish Cutty Sark retail prices in a "parity relationship" with the rest of the "big four." Tr. 675. Nevertheless, although petitioner "suggested" and discussed resale prices, it ostensibly recognized its obligation not to dictate such prices or to become involved in pricing disputes between its distributors. Tr. 121, 437-38, 458-59, 625.

In late April 1981, respondent ran a special ten day discount on Cutty Sark (Tr. 207-10; Exh. 101) which petitioner regarded as "excessive." Tr. 449. Although petitioner later claimed that its real objection was that this discount was done "without a plan" (Tr. 118-19, 450), in fact, the discount was part of a carefully coordinated effort which successfully stimulated sales. Tr. 207-15, 294, 345-46, 367-71.

Immediately upon learning of respondent's discount, Bernard Gellerman, the president of Copper State (respondent's competitor) telephoned Kenneth Ahlburg, petitioner's Vice President and Western Division Manager, whose office was in Los Angeles. Gellerman was "upset;" he called the discount "ridiculous," and assured Ahlburg that he was "not going to compete with that price." Tr. 585-86, 631-32. Instead of ignoring these complaints, as company policy required, Ahlburg demanded to know "what the hell [was] going on in Arizona" (Tr. 585), and promised Gellerman that "we'll find out what's going on." Tr. 633-34, 705. Ahlburg instructed Terry Lichtenberger, the regional sales manager, to investigate and confront Jack Braddock, respondent's president. Tr. 634, 705.

Soon thereafter, Gellerman again complained, this time to Lichtenberger, that respondent was "screwing up the market." Tr. 455-56. Gellerman, upset because he was no longer "controlling the market," demanded that petitioner "do something about it." Tr. 455-57, 464. Once again, instead of ignoring this protest, Lichtenberger promised to see Braddock. Tr. 461-62.

Lichtenberger relayed Gellerman's complaints to Braddock, who explained that since Copper State, through lower pricing, had outsold respondent in recent months, the discount had been initiated to stimulate sales, encourage respondent's

sales force, and to "show the competition [*i.e.*, Copper State] that we were still in the business of selling Cutty Sark." Tr. 217-19, 462-63. Lichtenberger reported back to Ahlburg, who responded that he did not "appreciate this type of thing happening." Tr. 471, 475, 478.

Ahlburg next telephoned his superior, Stephen Karp, petitioner's Senior Vice President, in New York. Once more, instead of instructing Ahlburg to ignore this pricing dispute between petitioner's distributors, Karp directed Ahlburg to go to Phoenix to investigate. Tr. 109, 635. Ahlburg went to Phoenix and confronted Braddock, who repeated the explanation he had given Lichtenberger. Tr. 221-22, 640-41. Ahlburg warned Braddock that such discounting was "definitely against" petitioner's new philosophy, and that Buckingham wanted, "in the future, [to] have a say in the programming of the brand," *i.e.*, "to outline [respondent's] discounts." Tr. 221-22, 645.[3]

Later that same day, Ahlburg met Gellerman. Ahlburg repeated portions of his conversation with Braddock. Gellerman assured Ahlburg of his belief that discounts were a "stupid move." Tr. 592-93, 596-97. When told of Braddock's statement that Copper State had priced below respondent from time to time, Gellerman replied: "I swear I've never done that" or "I swear I've not been doing any such pricing." Tr. 589, 591-93, 712; Exh. 101. Gellerman then asked for the line on an exclusive basis, *i.e.*, for the termination of respondent, and promised: "I will make this kind of commitment, whatever it takes to build this brand I'm here to do it." Tr. 712-13. Ahlburg promised Gellerman that he would recommend respondent's termination. Tr. 519, 592, 713.[4]

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[3] "Programming" means pricing and discounting of a product, as well as other aspects of marketing. Tr. 223, 361.

[4] Gellerman's testimony flatly contradicted Ahlburg's and Lichtenberger's in a number of important respects. For example, Gellerman first admitted, then denied, that he had discussed pricing or discounting at all, denied that Ahlburg had said anything about meeting Braddock, and "did not recall" his complaining statements to Lichtenberger. Tr. 509-11, 513, 515-18, 569, 582-83. Gellerman even denied that he had complained to Ahlburg at all about respondent's discounts, asserting: "[I]f I would have said anything to him about the discounts I know his words would have been, 'Hey, if you can't stand the heat get out of the kitchen.' I wouldn't have said anything." Tr. 568.

The next day, Ahlburg returned to Los Angeles and telephoned his report and recommendation to Karp. Karp told Ahlburg to put things "down on paper." Tr. 110, 647-50, 714-15. Ahlburg did so in the form of a memorandum to Karp (the "Ahlburg Memorandum"), dated April 29, 1981, to which he attached a copy of respondent's "deal sheet" listing the April discounts. Tr. 653-55; Exh. 101, Resp. App.[5] This document—the only document in the case which discussed the reasons for the termination (Tr. 660-61)—repeated Ahlburg's unhappiness with respondent's discounting, reported Gellerman's "swearing" that he had not done the same, and concluded by recommending the termination of respondent. Exh. 101, Resp. App.

Before this time, Karp had been "non-committal" about the situation in Arizona. Tr. 107. In late April, he received the Ahlburg Memorandum (Tr. 109), and sometime thereafter recommended to Newman that respondent be terminated. Newman relied totally on Karp's oral recommendation, and devoted about five minutes to the decision. Tr. 667-71. By June or early July 1981, Karp told Ahlburg that petitioner was "going to go" with the termination. Tr. 662. Respondent was notified on August 17, 1981. Tr. 296, Exh. 103.[6]

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[5] Although petitioner reproduced the Ahlburg Memorandum in its appendix (Pet. App. F, p. 20a), it failed to include the "deal sheet," which was also a part of Exhibit 101. Respondent has reproduced the entire exhibit as an appendix to this brief.

[6] Petitioner insisted that pricing was "irrelevant" to the decision to terminate (Tr. 651), and continues to advance other reasons. Pet., p. 4. Respondent presented evidence from which the jury could have rejected all of these reasons:

First, Copper State's "victory" in the "wine contest" was due to greater inventory; respondent abandoned the contest after one month when advised by Lichtenberger that it could not catch up without paying a surcharge over the usual price to obtain more wine. Tr. 229-31, 286-87, 324-27. Moreover, Newman testified that the results of the wine contest were irrelevant to a distributor's ability to sell Cutty Sark. Tr. 692.

Second, contrary to petitioner's assertion (Pet., p. 4), the record did *not* show that "Copper State's comparative sales performance figures were consistently higher than ADC's." Respondent's total sales were higher through 1981 until its termination, and had increased by a greater margin during the preceding year. Tr. 207-08, 570-71, 680; Exh. 50.

Third, Braddock explained that his "necessary evil" comment reflected no lack of commitment; indeed, respondent had sold the product for twenty-five years on an unprofitable basis precisely because it had such a commitment. Tr. 198-202.

(footnotes continued on following page)

II.

Proceedings Below.

Although it portrays itself as having been dragged into litigation as the helpless victim of circumstances, in fact it was petitioner which initiated this case and was the plaintiff in the district court. Only one week after respondent was notified of its termination, petitioner filed an action for declaratory judgment on August 25, 1981. CR 1. Respondent answered and counterclaimed on September 16, 1981, adding Copper State and its parent Mazel Corporation as counterdefendants, and alleging, *inter alia*, that it was terminated pursuant to unlawful concerted action to eliminate price competition, in violation of the Sherman Act, 15 U.S.C. § 1. CR 19. Following an expedited discovery schedule, a jury trial commenced on November 17, 1981. Petitioner and Copper State moved for a directed verdict following three days of testimony. The district court changed its mind three times before finally granting the motion (Tr. 807, 873, 888), on the ground that there was "no evidence to show that [counterdefendants] acted in concert." Tr. 888, Pet. App. C, p. 15a. Judgment was entered on December 10, 1981. Pet. App. D.

In a five page, unpublished memorandum filed February 25, 1983, the court of appeals reversed, holding that "there was sufficient circumstantial evidence of concerted action to withstand the motion for a directed verdict." Pet. App. B, p. 9a. Contrary to petitioner's surmise that the court of appeals considered only two items of evidence and ignored other critical evidence (Pet., pp. 13-15), it is clear from the court of appeals' memorandum that petitioner's evidence was considered fully:

> "Buckingham presented evidence that it terminated ADC in its independent discretion and for legitimate business reasons unrelated to price. This evidence included

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(footnotes continued from preceding page)

Fourth, in view of Gellerman's denials on the stand of statements made by *petitioner's* witnesses (*see* note 4, *supra*), and his trial demeanor (which of course cannot be observed on appeal), the jury could have concluded that he perjured himself, and rejected not only his testimony but petitioner's claim that he "had persistently displayed his commitment." Pet., p. 4.

Buckingham's desire to upgrade the Cutty Sark image, its desire for an eager distributor to whom Buckingham's brands would be important, the results of the wine contest, the comparison of growth in Cutty Sark sales prior to the April discount, the "Ceccarelli" testimony, and the Finlandia discount.

"Viewing the evidence in the light most favorable to Odom, however, we find that there was sufficient evidence to support a jury verdict in its favor by reasonable persons. Particularly persuasive are the "Ahlburg Memorandum" which focused on the pricing reasons for the termination, and Gellerman's offer to make a "commitment" in exchange for an exclusive distributorship. While Gellerman might have only meant a commitment to sell the product aggressively, a reasonable jury might have interpreted it as an offer to let Buckingham have some control over price. We therefore conclude that the district court erred in granting a directed verdict." (Pet. App. B, pp. 9a-10a.)

Petitioner did not seek a rehearing in the court of appeals.

REASONS FOR DENYING THE WRIT

This case does not present any issue beyond the correctness of the court of appeals' review of the evidence. None of the legal issues raised by petitioner were even addressed by the court of appeals. In reality, petitioner asks this Court to independently review the evidence and substitute its judgment for that of the court of appeals.

I.

The Court Of Appeals Reviewed The Evidence And Correctly Concluded That A Directed Verdict Should Not Have Been Granted. There Is No Conflict Between That Holding And The Decisions Of This Court Or Any Other Circuit.

Petitioner's arguments that the court of appeals' ruling "encourages anti-competitive behavior" and "rests upon two basic errors of law" are specious. Pet., pp. 12-16.

The "two basic errors of law" identified by petitioner are (1) that the court of appeals gave too much weight to respondent's evidence, specifically the Ahlburg Memorandum and Gellerman's promise of a "commitment" (Pet., pp. 13-14); and (2) that the court of appeals did not give enough weight to what petitioner terms "the most probative piece of evidence on the conspiracy issue." Pet., p. 15. This is a transparent attempt to present a factual question—the sufficiency of the evidence—and not a legal question. As Mr. Justice Holmes declared in *United States v. Johnston*, 268 U.S. 220, 227 (1925):

> "We do not grant a certiorari to review evidence and discuss specific facts."

Petitioner characterizes the court of appeals' ruling as standing for the proposition that "complaints" and "inquiries" are all that are necessary to reach the jury on a vertical price-fixing claim. Pet., p. 13. Such a "holding" cannot be found in the court of appeals' decision, and the evidence cannot be so characterized. Respondent has conceded throughout this case that proof of *concerted action* is necessary, *i.e.*, that it must prove that petitioner and Copper State "had a unity of purpose or a common design and understanding, or a meeting of the

minds in an unlawful arrangement." *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946).[7] The evidence was sufficient to permit reasonable jurors to infer that, far more than merely "inquiring" into the situation, petitioner reached a "meeting of the minds" with Copper State concerning resale pricing and the termination of respondent.

In its attack upon the sufficiency of the evidence, petitioner incorrectly implies that the court of appeals relied *only* on the Ahlburg Memorandum and a single statement by Gellerman in reaching its decision. Pet., p. 13. While the court of appeals found these items of evidence "particularly persuasive," (Pet. App. B, p. 9a), there is no indication that it relied solely upon them. Other evidence supported the court of appeals' decision, including among other things the Ahlburg-Gellerman and Ahlburg-Braddock discussions of pricing, Gellerman's "swearing" that he was not a price cutter, Ahlburg's warnings that discounting violated Buckingham philosophy, Lichtenberger's statement that respondent was terminated because it violated that philosophy (Tr. 481), the discrediting of the asserted non-price reasons for the termination, and the sharp conflict in the testimony of counterdefendants' witnesses on crucial issues. Petitioner isolates two items of evidence, then separately analyzes and rejects them, in violation of the rule that conspiracy evidence must not be compartmentalized, but considered as a whole. *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 699 (1962).

Petitioner makes two jury arguments regarding the evidence cited by the court of appeals. First, it contends that the

[7] Direct evidence of a formal agreement, such as petitioner apparently would demand, is unnecessary. A combination or conspiracy may be found in "a course of dealings or other circumstances as well as in any exchange of words." *Id.* at 809-10. Because such agreements are invariably covert, and because "conspiracy is rarely susceptible of direct proof, a plaintiff must rely on circumstantial evidence." *Program Engineering, Inc. v. Triangle Publications, Inc.*, 634 F.2d 1188, 1195 (9th Cir. 1980). A "knowing wink can mean more than words." *Esco Corp. v. United States*, 340 F.2d 1000, 1007 (9th Cir. 1965).

Ahlburg Memorandum "said nothing about an agreement," and was contrary to "the overwhelming weight of the evidence at trial indicat[ing] that Buckingham's principal reasons for terminating ADC were unrelated to price." Pet., p. 13. However, the statement in the memorandum that: "I spoke to Bernie Gellerman and he swears he has not been doing any such pricing," when placed in the context of the other evidence, certainly permitted the inference of an understanding. Moreover, since the only document which discussed the termination mentioned only price, and since petitioner's other excuses for the termination were discredited (*see* note 6, *supra*), it is simply incorrect that "the overwhelming weight of the evidence" pointed to non-price reasons.[8] Second, petitioner interprets Gellerman's promised "commitment" as just an offer to sell the product aggressively. Pet., p. 14. The jury, however, placing this remark in the context of other evidence, including Gellerman's "swearing" in the same conversation that he was not a price cutter, "might have interpreted it as an offer to let Buckingham have some control over price." Pet. App. B, p. 10a.[9]

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[8] Petitioner is of course correct that under *United States v. Colgate & Co.*, 250 U.S. 300 (1919), a supplier may *unilaterally* terminate a distributor for price reasons. The decision below is in no way inconsistent with this rule, since the court of appeals required, and the evidence indicated, *concerted* action. Pet. App. B, p. 9a.

> "When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices . . . he has put together a combination in violation of the Sherman Act." (*United States v. Parke, Davis and Co.*, 362 U.S. 29, 44 (1960).)

[9] Petitioner's reliance upon *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), for the proposition that price fixing should be excused if it may promote interbrand competition, is also misplaced. There, the Court cautioned:

> "[W]e are concerned here only with nonprice vertical restrictions. The *per se* illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy." (*Id.* at 52 n.18.)

Galloway v. United States, 319 U.S. 372 (1943), is completely inapposite. There, in a claim for veteran's benefits, the Court was "unable to conclude that one whose burden . . . is to show continuing and total disability for nearly twenty years supplies the essential proof of continuity when he wholly omits to show his whereabouts, activities or condition for five years, although the record discloses evidence must have been available . . . " *Id.* at 396.

Next, petitioner appeals to this Court as jurors to consider what it calls the "most probative piece of evidence" in the case: Braddock's letter, written prior to the inauguration of the Newman regime at Buckingham and more than a year before the events at issue in the case, requesting an exclusive distributorship. Contrary to petitioner's repeated assertion, it was far from "undisputed" that interbrand competition was promoted by the termination of respondent. Petitioner neglects to mention that Copper State already distributed Dewar's, another of the "big four," on an exclusive basis. Tr. 521-22. The termination of respondent thus *eliminated* interbrand competition between two of the four premium scotches in Arizona, since Copper State distributed and was in a position to set the prices for both. Of course, this was consistent with petitioner's avowed goal of establishing the price of Cutty Sark as equally as possible to the prices of J & B, Johnnie Walker Red, and Dewar's—in other words of eliminating price competition with these brands.[10]

Even assuming the accuracy of petitioner's contention that interbrand competition ultimately was promoted by the termination, the termination nevertheless was not immunized if it was substantially the product of an unlawful agreement to eliminate price competition. The existence of legitimate reasons for the termination "makes it neither more nor less probable that . . . [petitioner] acted in concert with others rather than unilaterally." *H. L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 943 (2d Cir. 1981), *cert. denied*, 103 S.Ct. 176 (1982). The test is whether the elimination of price competition, pursuant to a meeting of the minds between petitioner and Copper State, substantially contributed to the decision to terminate respondent. *Uniroyal Inc. v. Jetco Auto Service, Inc.*, 461 F.Supp. 350, 355 (S.D.N.Y. 1978); *see Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 143-44 (1968) (White, J., concurring). Petitioner stretches the court of

[10] As the Court noted in *Continental T.V. v. Sylvania*, "[r]esale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only *among* sellers of the affected product, but quite as much *between* that product and competing brands." 433 U.S. at 52 n.18; original emphasis; *quoting White Motor Co. v. United States*, 372 U.S. 253, 268 (1963) (Brennan, J., concurring). This case certainly fits that description.

appeals' reasoning beyond recognition by ascribing to it a "belief" that the Braddock letter "was not to be considered . . . in determining whether a conspiracy existed" (Pet., p. 15); nothing in the decision so indicates. At any rate, this evidence was for the jury to consider.

Petitioner's attack on the court of appeals for its purported "conclusion"—nowhere stated in the decision—"that a conspiracy may be inferred notwithstanding undisputed evidence that a termination was in the supplier's competitive self-interest" (Pet., p. 15) is unwarranted.[11] Not only was the evidence disputed, but petitioner's premise misstates the law. In effect, petitioner contends that a showing of adverse self-interest is always necessary regardless of the amount or weight of the other evidence. Neither the cases cited by petitioner nor the Department of Justice have adopted this position. At most, those authorities suggest that mere *parallel action* does not give rise to an inference of collusion, where there is no other direct or circumstantial evidence of agreement and no showing that the acts are inconsistent with the firm's self-interest.[12] This case

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[11] Although the elimination of interbrand price competition may have been in petitioner's "competitive self-interest" (Pet., p. 15), "the policy of the antitrust laws is not qualified or conditioned by the convenience of those whose conduct is regulated." *United States v. Paramount Pictures*, 334 U.S. 131, 159 (1948).

[12] *See Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 744 (7th Cir. 1982) (refusal to grant preliminary injunction affirmed where "[t]here was no . . . direct evidence and the circumstantial evidence was . . . too tenuous . . ."); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 114-15 (3d Cir. 1980), *cert denied*, 451 U.S. 911 (1981) ("aside from the evidence of complaints made to Texaco by other retailers, Sweeney introduced no evidence of a conspiracy . . ."); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) (where consciously parallel business behavior was all that was alleged, a showing of acts against self interest would be required). In an *amicus* brief filed with this Court in the *Plywood Antitrust Litigation*, the government indicated its position that evidence of acts against self interest is only necessary when parallel conduct is relied upon to supplement other direct or circumstantial evidence of agreement:

> "[T]he plaintiff should be allowed to introduce evidence of parallel conduct to *supplement* other evidence of agreement, direct or circum-

(footnotes continued on following page)

does not involve mere parallel action. Petitioner cites no case in which a showing that the conspiracy was against self-interest was required where the circumstantial evidence of conspiracy was otherwise sufficient to go to the jury, as it was here. There is no conflict between the decision below and that of any other circuit.

The contention that the court of appeals' decision "encourages anticompetitive behavior" is also without merit. This argument requires the factual assumptions that only routine "complaints and inquiries" were made, that petitioner's actions were entirely unilateral, and that the termination promoted interbrand competition; all of these assumptions are disputed.[13] The evidence showed conduct which was far from "inevitable." After *Buckingham*, a supplier is still free to *unilaterally* terminate its distributor, even a price cutter, for whatever reasons it chooses (and an attorney may so advise his or her client); it is still not free to do so pursuant to concerted action with a competing distributor to eliminate price competition. The "Catch 22" perceived by petitioner and the district court is illusory. Had petitioner not engaged in actions which permitted the reasonable inference of concerted action, it would have been free to terminate either wholesaler without fear of antitrust liability. The court of appeals' decision that the evidence permitted such an inference is fully consistent with existing law.

(footnotes continued from preceding page)

stantial, only if he is prepared to show that the parallel conduct was inconsistent with the defendants' independent competitive interest and, hence, unlikely to occur absent collusion." ("Brief for the United States as Amicus Curiae," p. 10, *Weyerhaeuser Co. v. Lyman Lamb Co.*, Nos. 81-1618, 81-1619 (U.S.); emphasis added.)

[13] Petitioner's assertion that complaints from rival distributors about price cutting are inevitable is contradicted by the record. Respondent *never* complained about Copper State's discounts on Cutty Sark (Tr. 208, 530); Braddock only referred to them when petitioner demanded an explanation for respondent's price cutting. The statement that "[i]n each case, the higher price wholesaler complained" (Pet., p. 12) is simply wrong.

II.

Petitioner's Attempt To Link This Case To *Monsanto v. Spray-Rite* Is Based Upon An Erroneous Characterization Of The Evidence And An Imaginary Conflict Between The Decision Below And Those Of Other Circuits.

Recognizing the weakness of its position as confined to this case alone in light of the record below, petitioner suggests that this Court will be "assisted" if this case is heard in tandem with *Spray-Rite Service Corporation v. Monsanto Company*, 684 F.2d 1226 (7th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3627 (U.S. Feb. 28, 1983) (No. 82-914). Pet., pp. 7-11. The Court should reject this invitation.

Although it claims that the issues in this case and in *Monsanto* are "so related" that "little additional burden would be placed on this Court's docket" by combined consideration (Pet., p. 11), petitioner elsewhere concedes that the facts and issues in the two cases are entirely different. In *Monsanto*, the Seventh Circuit held that "proof of termination following customer complaints is sufficient to support an inference of concerted action." 684 F.2d at 1238.[14] Petitioner implicitly concedes that this case does not involve complaints alone. Pet., pp. 7-8. Petitioner thus would have this Court resolve the so-called "broader issue" of the circumstances under which subsequent communications between the supplier and its distributors may support an inference of conspiracy. However, this "broader issue" is not presented by this case.

First, it is not at all apparent that the conflict petitioner posits on this issue actually exists. The conflict identified by Justice White in *Schwimmer v. Sony Corporation of America*,

[14] The question of whether a conspiracy may be inferred solely from evidence of such complaints followed by termination has been accepted by the Court for review in *Monsanto*. Although it describes the resolution of this issue as "of limited utility," and although the facts of this case go well beyond complaints, petitioner poses exactly the same issue as its Question 1 in the Petition. There is no basis for this Court to consider the identical issue in this case, especially given petitioner's view of its unimportance.

103 S.Ct. 362, 363 (1982) (White, J., dissenting from denial of certiorari), concerned the sufficiency of complaints alone—the issue accepted for review in *Monsanto*—not the sufficiency of subsequent communications. None of the cases cited by petitioner appear to disagree over the "broader issue."

Second, even assuming there is such a conflict, the court of appeals' holding that evidence of the type shown in this case suffices to go to the jury does not conflict with any of the decisions cited by petitioner.[15] Although petitioner persists in inaccurately labelling its actions as "routine inquiries," the evidence supports a much stronger characterization. Petitioner has not explained how the result in this case would have differed in any other circuit; clearly, it would not have.

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[15] None of the cases cited by petitioner involved evidence nearly as strong as the Ahlburg-Gellerman and Ahlburg-Braddock pricing conversations and the Ahlburg memorandum. The cases cited for the existence of a so-called conflict regarding "communication" evidence involved complaints only, or at most, complaints and internal discussions. *See, e.g., Bruce Drug, Inc. v. Hollister Inc.*, 688 F.2d 853, 856 (1st Cir. 1982) (preliminary injunction to continue supply vacated; no evidence beyond receipt of complaints); *Battle v. Lubrizol Corp.*, 673 F.2d 984, 992, *reh'g en banc granted* (8th Cir. 1982) (summary judgment for defendant reversed; no evidence beyond receipt of complaints and internal supplier discussions); *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190 (6th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3421 (November 19, 1982) (No. 82-848) (summary judgment affirmed; no evidence beyond complaints); *Roesch, Inc. v. Star Cooler Corp.*, 671 F.2d 1168, 1172, *reh'g en banc granted* (8th Cir. 1982) (directed verdict affirmed; no evidence beyond complaints); *Schwimmer v. Sony Corp. of America*, 677 F.2d 946, 953 (2d Cir.), *cert. denied*, 103 S.Ct. 362 (1982) (judgment for plaintiff reversed; no evidence beyond complaints); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 743 (7th Cir. 1982) (refusal to grant preliminary injunction for plaintiff affirmed; no evidence that supplier communicated with competing distributor about termination); *Venture Technology, Inc. v. National Fuel Gas Company*, 685 F.2d 41, 47 (2d Cir.), *cert. denied*, 103 S.Ct. 362 (1982) (judgment for plaintiff reversed; no evidence beyond complaints); *Blankenship v. Herzfeld*, 661 F.2d 840, 845 (10th Cir. 1981) (judgment for defendant affirmed; no evidence beyond complaints); *H. L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 942 (2d Cir. 1981), *cert. denied*, 103 S.Ct. 176 (1982) (judgment for plaintiff reversed; evidence of complaints alone, plus discrediting of other explanations for termination, not enough absent some basis to infer concerted action); *Bostick Oil Co. v. Michelin Tire Corp.*, 1983-1 Trade Cas. (CCH) ¶65,271 (4th Cir. 1983) (directed verdict for defendant reversed; receipt of complaints followed by termination sufficient). *See also* note 12, *supra*.

Third, this case is particularly inappropriate to resolve such a conflict, if it exists. The court of appeals did not acknowledge such a conflict, did not cite or discuss a single one of the cases which petitioner lists, and disposed of the appeal in an unpublished memorandum. If there were a conflict between this case and other decisions, this Court would have to independently review the record and substitute its own view of the evidence for that of the court of appeals in order to ascertain it.

Finally, even if the "broader issue" of the sufficiency of "communications" evidence actually were presented by this case, petitioner's assumption that it could not be resolved in *Monsanto* is flawed. If the Court affirms the Seventh Circuit, the issue will be moot. If the Court reverses in *Monsanto*, presumably it will indicate in doing so the degree of evidence required to infer concerted action. Either way, consideration of this case would be redundant.[16]

III.

Petitioner's Attack On The Per Se Rule Was Not Raised In The Court Of Appeals, And In Any Event Is Unwarranted.

Petitioner's final point requires little response. Although petitioner asks this Court to grant certiorari to consider whether concerted action to maintain resale prices should continue to be classified as *per se* illegal, it failed to raise this argument to the court of appeals. This Court should not consider the issue in the first instance. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Petitioner gives no valid reason why a rule which is uniformly followed by the circuits should be abandoned.[17] In

[16] For the above reasons, petitioner's alternative suggestion to delay disposition of this case until the decision in *Monsanto* is inappropriate.

[17] *See, e.g., Com-Tel, Inc. v. DuKane Corp.*, 669 F.2d 404 (6th Cir. 1982); *Alloy International Co. v. Hoover-NSK Bearing Co.*, 635 F.2d 1222 (7th Cir. 1980); *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979); *Girardi v. Gates Rubber Co. Sales Division, Inc.*, 325 F.2d 196 (9th Cir. 1963); *Bostick Oil Co. v. Michelin Tire Corp.*, 1983-1 Trade Cas. (CCH) ¶65,271 (4th Cir. 1983).

any event, if this Court does reconsider the rule in connection with *Monsanto*, there is no reason to do so in this case as well. As discussed above, petitioner's assumption that the conduct at issue here was indisputably procompetitive is incorrect, both on the facts of this case and as a matter of policy. *See* notes 9 and 10, *supra*.

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

DATED: May 16, 1983

Respectfully submitted,

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APPENDIX

Exhibit 101 (Tr. 113)

MEMORANDUM

PERSONAL & CONFIDENTIAL Date: April 29, 1981

To: Steve Karp From: Ken Ahlburg

Subject: ARIZONA

The state of Arizona is too small for two wholesalers selling our line. Forgetting all the standard cliches, shelf management is non-existent and uniform marketing that gets results cannot be coordinated with a dual.

This month, Arizona Distributors had a 5 case discount of $15.00 off on Cutty Sark (see attached), coupled with April being a buy-in, makes no sense. Plus, 5 case discounts do not get floors, 50 and 100 case discounts get the action. We sold a lot of goods in but the action to the consumer is not there.

I spoke with Jack Braddock regarding this, and his reason was that he felt that Copper State was always beating his deal by a dollar. By doing this, he would "show Copperstate".

In my opinion, "Showing Copper State" can and will be very detrimental to our over-all long term marketing of Cutty Sark.

I also spoke to Bernie Gellerman and he swears he has not been doing any such pricing.

I am recommending we have Copper State handle our complete line on an exclusive basis.

Regards,

KA:hb

ARIZONA DISTRIBUTING COMPANY

APRIL 20TH THRU APRIL 30TH

CUTTY SARK SCOTCH

(ALL SIZES ASSORT)

		1 CASE	3 CASES	5 CASES
1.75 LITER	(103.80)	10.00	12.00	15.00
LITER	(125.40)	10.00	12.00	15.00
750 ML	(94.80)	8.00	10.00	12.00
500 ML	(138.00)	10.00	12.00	15.00
200 ML	(122.40)	10.00	12.00	15.00

NET BOTTLES

	1 CASE	3 CASES	5 CASES
1.75 LITER	15.64	15.30	14.80
LITER	9.62	9.45	9.20
750 ML	7.24	7.07	6.40
500 ML	5.34	5.25	5.13
200 ML	2.35	2.30	2.24

(1.75 LITER AND LITER STILL ASSORT IN PREMIUM FAMILY BAR PLAN)

SPECIAL

No. 82-1787

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Office-Supreme Court, U.S.
FILED
MAY 23 19
ALEXANDER L. STEVAS,
CLERK

THE BUCKINGHAM CORPORATION,

Petitioner,

—v.—

THE ODOM CORPORATION,
d/b/a ARIZONA DISTRIBUTING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I.

The Questions Presented

Respondent attempts to characterize this case as one presenting only an issue of fact: "Did the court of appeals err in holding that there was sufficient circumstantial evidence of concerted action to withstand the motion for a directed verdict?" (Br. in Opp. i) If that were all that is at issue in

1 Petitioner's parent and affiliates are listed on pages iii and 1a-7a of the petition.

termination cases like this, we doubt that the Court would have granted certiorari in *Monsanto Company* v. *Spray-Rite Service Corporation*, No. 82-914 (*cert. granted* Feb. 28, 1983). As in *Monsanto*, the fundamental question presented for review here is the standard the courts should apply in determining whether there is sufficient evidence to infer a conspiracy to fix prices. This issue is the subject of confusion among the circuits and its resolution will have a far reaching effect on competition.

Buckingham, even more powerfully than *Monsanto*, demonstrates the consequences of applying a lenient and imprecise standard for inferring a price fixing conspiracy in a vertical context. Under *Dr. Miles Medical Co.* v. *John D. Park & Sons*, 220 U.S. 373 (1911), once a conspiracy is inferred, the court must apply the *per se* rule. This conjunction of the easy inferrence of concerted action with the *per se* rule permits a drastic result in cases like *Buckingham:* the leap from routine inquiries between a supplier and its wholesalers about a price cut to treble damage exposure if a wholesaler is terminated even for procompetitive reasons.[2]

The standard for inferring a *per se* unlawful price-fixing conspiracy cannot be simply transported from horizontal to vertical cases as Odom suggests (Br. in Opp. 8-9) without subverting the intent of the antitrust laws. Since in horizontal relationships there are rarely legitimate reasons for competitors to communicate about price, *United States* v. *Container Corporation of America*, 393 U.S. 333 (1969), it is consistent with antitrust policy to combine the easy inference of concerted action with the *per se* rule in such cases. In vertical relationships, on the other hand, dialogue between suppliers and wholesalers—far from having a "pernicious effect on competi-

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2 Respondent's adversarial summary of the evidence (Br. in Opp. 2-5) shows that there were no threats and no suggestions for future pricing. If the conversations which took place can permit a finding of antitrust conspiracy, any discussion between a supplier and a wholesaler concerning resale price, no matter how innocuous, could be the basis of a treble damage verdict and injunction against a procompetitive termination.

tion" or lacking "any redeeming [competitive] virtue," *Continental T.V., Inc.* v. *GTE Sylvania Inc.* 433 U.S. 36, 49-50 (1977)—is necessary to the maintenance of efficient systems of distribution. *Buckingham* demonstrates that the easy transition from such communications to *per se* illegality in vertical cases may actually promote anticompetitive behavior since dialogue will be chilled and suppliers will often choose to preserve an inefficient status quo.

Respondent attempts to resolve the supplier's dilemma created by the Ninth Circuit's decision with a simplistic statement: "Had petitioner not engaged in actions which permitted the reasonable inference of concerted action, it would have been free to terminate either wholesaler without fear of antitrust liability." (Br. in Opp. 13) This merely begs the ultimate question of what conduct warrants an inference of *per se* illegality. Moreover, it demonstrates the harsh result in *Buckingham*. As long as there are complaints and inquiries concerning a price cut, suppliers are not free to terminate the wholesaler—even where termination permits the supplier to compete more effectively.

II.

Buckingham's Relationship to *Monsanto*

Respondent's attempt to distance this case from *Monsanto* requires little response. Respondent ultimately acknowledges that *Monsanto* invites the Court to reach the fundamental legal issue: "the degree of evidence required to infer concerted action." (Br. in Opp. 16) This is precisely the issue presented here in a context more typical of events in the market place.[3]

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3 Contrary to respondent's assertion (Br. in Opp. 15 n. 15), the petition cited numerous cases which involved communications between the supplier and one or more of its wholesalers, as well as complaints and internal discussions. *See, e.g., Bostick Oil Co.* v. *Michelin Tire Corp.*, 1983-1 Trade Cas. (CCH) ¶ 65,271, at 69,594 (4th Cir. 1983) (supplier's vice president directed sales manager to talk to plaintiff regarding complaints); *Schwimmer* v. *Sony Corp. of America*, 677

III.

Reviewability of the *Per Se* Rule

Finally, respondent attempts unreasonably to restrict the Court's discretion to review the applicability of the *per se* rule to procompetitive conduct in vertical price-fixing cases. This Court has acknowledged in numerous cases its discretion to consider issues not raised in the court of appeals. *See, e.g., Youakim* v. *Miller,* 425 U.S. 231 (1976) and cases cited therein.

Buckingham argued in the district court that its termination of respondent should be evaluated under the rule of reason (Buckingham's Trial Memorandum 24-29); since the district court granted Buckingham's motion for a directed verdict, Buckingham had no need to make this argument in the Court of Appeals.

The Department of Justice has already asked the Court in *Monsanto* to reconsider the rationale of *Dr. Miles Medical Co.* v. *John D . Park & Sons,* 220 U.S. 373 (1911). *See* Pet. 17 n. 21. A formality should not prevent the Court from addressing this "important, recurring issue", *see Carlson* v. *Green,* 446 U.S. 14, 17 n.2 (1980), in the context of the *Buckingham* record—a record which, unlike the *Monsanto* record, involves a termination with clear procompetitive benefits.

Moreover, since the *per se* rule is inextricably tied to the standard for inferring concerted action in vertical price-fixing cases, "resolution of this question of law is a 'predicate to an intelligent resolution' " of the other questions presented. *See Cuyler* v. *Sullivan,* 446 U.S. 335, 342 n.6 (1980) (citation omitted).

F.2d 946, 948 (2d Cir.), *cert. denied,* 103 S. Ct. 362 (1982) (supplier's vice president told complaining distributor that there would be changes to reduce price cutting); *Oreck Corp.* v. *Whirlpool Corp.,* 639 F.2d 75, 80 (2d Cir. 1980), cert. denied, 454 U.S. 1083 (1981) (supplier's salesman told plaintiff about other retailers' disapproval of plaintiff's advertisements).

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted and set down for argument in tandem with *Monsanto*. In the alternative, the Court should hold consideration of the petition until a decision has been rendered in *Monsanto*.

Dated: May 23, 1983

Respectfully submitted,

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